Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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NO. 79-1127

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**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

* * *

The Petitioner, W. J. Estelle, Jr., Director, Texas Department of Corrections, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on October 22, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 602 F.2d 694 and is reproduced in the appendix hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 13, 1979. Rehearing and rehearing en banc were denied on October 22, 1979.

This petition for a writ of certiorari was filed within ninety days after that final judgment denying rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the defendant was denied due process by the use of psychiatric testimony at the punishment trial on the issue of future dangerousness.

2. Whether a defendant in a capital murder trial must be advised of a right to remain silent; a right to terminate the interview; and a right to be assisted by counsel in deciding whether to submit to the examination by a psychiatrist.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as Article 37.071, Vernon's Ann. C.C.P.(a), (b)(2) all of which are reproduced as Appendix B.

STATEMENT OF THE CASE

Respondent Ernest Benjamin Smith was convicted in Dallas County, Texas, for the offense of capital murder. His punishment was assessed at death. The Court of Criminal Appeals of the State of Texas affirmed the conviction on February 18, 1976. *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976). Respondent was formally sentenced to death on October 20, 1976 by the trial court. His execution was set for November 22, 1976. A stay of execution pending timely filing of a petition for writ of certiorari was granted by this Court on November 6, 1976. On March 5, 1977, this Court denied the petition for writ of certiorari. On March 22, 1977, Respondent was again formally sentenced and the execution was scheduled for April 26, 1977.

On April 18, 1977, Respondent presented an application for writ of habeas corpus to the trial court. On April 19, 1977, Respondent presented an application for stay of execution to the Texas Court of Criminal Appeals. It was considered as an original writ of habeas corpus and denied in a written opinion on April 20, 1977. On April 21, 1977, Respondent filed an application for stay of execution and application for writ of habeas corpus in the United States District Court for the Northern District of Texas, Dallas Division. Respondent's application for stay of execution was granted on April 22, 1977. Respondent's application for writ of habeas corpus was granted by the district court without a hearing in a 29 page memorandum opinion on December 30, 1977. *Smith v. Estelle*, 445 F.Supp. 647 (N.D.Tex. 1977). Petitioner filed a motion for new trial on January 9, 1978, which was denied by the district court without a hearing on March 27, 1978.

The order of the district court was affirmed by the United States Court of Appeals for the Fifth Circuit in a panel decision on September 13, 1979. Rehearing and rehearing en banc were denied on October 22, 1979. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

1. The court below based its findings that the Respondent had been surprised by the presentation of the psychiatric evidence on disputed issues of fact without an evidentiary hearing.

2. The court below erred in finding a denial of due process based on *Gardner v. Florida*, 430 U.S. 349 (1977) in that the evidence upon which the jury based its sentencing findings was presented in open court.

3. The court below erred in setting forth certain Fifth and Sixth Amendment warnings which must be given to a criminal defendant prior to a psychiatric

examination ordered by the court, when there is no showing that such examination was a custodial interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966).

ARGUMENT

I. THE COURT BELOW ERRED IN MAKING ITS FINDINGS AS TO THE DISPUTED SURPRISE ISSUE WITHOUT HOLDING AN EVIDENTIARY HEARING.

The Court of Appeals for the Fifth Circuit based its findings on the fact findings of the district court. No hearing was ever conducted in this cause. Rather, the district court resolved disputed issues of fact on the basis of affidavits submitted by trial counsel for Respondent and an affidavit from the trial judge. The trial judge's affidavit stated that to the best of his knowledge trial counsel were informed of the psychiatric examination. Defense counsel denied any notification. Further, the district court found that the prosecution had deliberately attempted to surprise the defense attorneys. There is, at most, a conjecture as to the events at trial with no opportunity given to fully develop the factual record as to the presentation of the psychiatric testimony. This case should be remanded for a hearing so that a complete factual basis may be before the courts before making the determinations.

II. THE COURT BELOW ERRED IN DETERMINING THAT THERE HAD BEEN A DENIAL OF DUE PROCESS BY THE PRESENTATION OF THE PSYCHIATRIC TESTIMONY AT TRIAL.

At the time the psychiatric testimony was presented, the Respondent had been found guilty by a jury of the

offense of capital murder. Respondent had testified in his own behalf and had admitted the robbery but denied that he intended for a murder to take place. During the punishment stage of the trial, the State rested subject to the opportunity to reopen after the defense had presented its mitigating evidence.[1] After the Respondent had presented his mitigating testimony the State called Dr. James Grigson, a psychiatrist, to testify as to the results of an examination he had performed under court order on Respondent prior to trial.

The examination was ordered by the trial court to determine the mental status of the Respondent. One of the findings made by the psychiatrist was that Respondent was a severe sociopathic personality. This language was contained in the letter from the psychiatrist to the court which was placed in the Clerk's file and available to counsel for either side.

Respondent knew he had been examined by the psychiatrist and his attorneys could have availed themselves of the traditional means of discovery to ascertain the full findings of the psychiatrist. Further, trial counsel never once made a motion for continuance based on surprise or sought a continuance to obtain testimony to contradict that of Dr. Grigson. Their only objection was that Dr. Grigson's name was not on the witness list as ordered by the trial court. That order was directed to witnesses, if known, at that time. There is no showing that the State knew that it would call Dr. Grigson at the punishment stage of the trial at the time the witness list issued.

The Court of Appeals' reliance on *Gardner v. Florida*, 430 U.S. 349 (1977) is misplaced. In that case, Petitioner Gardner was sentenced by the trial court on the basis of

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[1]The State contends that this unusual action was due to the unavailability of the psychiatrist at that time. The record is at best unclear as to these happenings.

information which he had no opportunity to deny or explain. In the present case, Respondent Smith was presented with testimony in open court before the jury. He had the opportunity to deny or explain the conclusions of the expert witness. There was no secret information brought before the jury or court. *Cf.*, *Williams v. New York*, 337 U.S. 241 (1949).

Under the provisions of Article 37.071, Vernon's Ann. C.C.P. evidence may be presented as to any matter that the court deems relevant to sentence. Surely, an expert witness' evaluations of the defendant's mental status is crucially relevant in the jury's determination whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Therefore, since the Respondent had the opportunity to cross-examine the expert witness and to take the stand himself and deny any feelings of lack of remorse he may have had, there was no denial of due process.

III. THE COURT BELOW ERRED IN SETTING FORTH CERTAIN FIFTH AND SIXTH AMENDMENT WARNINGS WHICH MUST BE GIVEN TO A CRIMINAL DEFENDANT PRIOR TO A PSYCHIATRIC EXAMINATION ORDERED BY THE COURT, WHEN THERE IS NO SHOWING THAT SUCH EXAMINATION WAS A CUSTODIAL INTERROGATION WITHIN THE MEANING OF *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966).

There has been no showing that the examination by the psychiatrist was an adversarial or accusatorial proceeding. Nor has there been any showing that it was a custodial interrogation. The purpose behind the examination of Respondent was to determine his mental status. The findings of the court-appointed expert were

that Respondent was competent to stand trial, that he was sane at the time of the commission of the offense, and that he was a sociopathic personality.

The courts have repeatedly held the privilege against self-incrimination does not extend to an examination by a court-appointed psychiatrist. *See, United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974); *United States v. Trapnell*, 495 F.2d 22 (2nd Cir. 1974); *United States v. Reason*, 549 F.2d 309 (4th Cir. 1977); *Karstetter v. Cardwell*, 526 F.2d 1144 (9th Cir. 1975); *United States v. Ashe*, 478 F.2d 661 (D.C. Cir. 1973); *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968). Additionally, at least one federal court has held that the prediction of future dangerousness is a proper subject for expert opinion. *United States v. Ashe, supra.*

The Fifth Amendment privilege against self-incrimination should not apply to statements made during the course of an examination by an expert witness. The purpose of such an examination is not to wrestle incriminating evidence from the defendant. No coercion is involved. The purpose of such an examination is to determine the mental characteristics and character traits capable of measurement. It is not the communications themselves that form the basis of the expert's opinion, but rather inferences from the communications. The information provided by the defendant is not admitted in evidence as proof of the matter stated, but rather to show the basis for the expert's inferences from which his conclusions are drawn. The expert could testify as to his inferences from a hypothetical fact situation. Surely an actual examination of the defendant is a more reliable form of evidence than merely answering hypothetical questions based on facts in evidence.

Further, the psychiatrist in the case at bar brought forward no new information. Respondent Smith had taken the stand and testified to the facts of the crime.

There was no attempt to use any statement he made to the psychiatrist as proof of his guilt.

Psychiatric testimony is considered expert testimony. The statements made to the psychiatrist to form the basis of that expert testimony should be considered as "real or physical" evidence rather than "communications or testimony," within the meaning of *Schmerber v. California*, 384 U.S. 757 (1966). See also, *United States v. Baird*, 414 F.2d 700 (2nd Cir. 1979).

To uphold the decision of the Court of Appeals would require a special psychiatric warning in addition to the *Miranda* warnings adminstered to a criminal defendant. This in itself could have a profound effect on numerous convictions within the state of Texas as well as other states.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

Ernest Benjamin SMITH,
Petitioner-Appellee,

v.

W. J. ESTELLE, Jr., Director, Texas Dept. of Corrections,
Respondent-Appellant.

No. 78-1839.

United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1979.

Rehearing and Rehearing En Banc
Denied Oct. 22, 1979.

Before WISDOM, GOLDBERG and VANCE, Circuit Judges.

GOLDBERG, Circuit Judge:

Ernest Benjamin Smith, Jr., the appellee in this case, participated in an armed robbery in which a person was killed. He was indicted for capital murder and convicted by a jury in Dallas County, Texas. Texas law provides that when a defendant is convicted of a capital crime, the court must immediately hold a hearing, before the same jury, to decide whether the defendant is to be sentenced to life imprisonment or put to death. The jury answers "yes" or "no" to each of three questions; if it answers all the questions in the affirmative, the judge must impose a death sentence. The second question[1]—the only one involved in this appeal—is

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[1]The other two questions are:

Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the

> whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Tex.Code Crim.Proc.Ann. art. 37.071 (Vernon Supp.1978).

At the sentencing hearing in Smith's case, a psychiatrist who had examined Smith testified for the state and strongly urged that Smith would commit acts of violence and would constitute a continuing threat to society. Smith was sentenced to death. After appealing through the state courts he petitioned for federal habeas corpus. Judge Porter of the United States District Court for the Northern District of Texas held that several particular aspects of the psychiatrist's testimony violated Smith's consitutional rights. He did not disturb Smith's conviction but he ordered that the death sentence not be carried out. The state appeals. We affirm.

I.

Smith and Howie Ray Robinson robbed a convenience store in Dallas on September 28, 1973. Both carried guns. During the robbery, the clerk in the store "reached for something." Smith called out to Robinson; one prosecution witness testified that Smith said "Watch out, Howie," but another asserted that Smith had later recalled saying, "Get him, Howie." Robinson shot and killed the clerk. Smith never fired his gun. There was testimony that Smith knew it was defective

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> reasonable expectation that the death of the deceased or another would result;
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> . . . . .
>
> [I]f raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Code Crim.Proc.Ann. art. 37.071 (Vernon Supp. 1978).

and could not be fired; there was also testimony that he had attempted unsuccessfully to fire it during the robbery. Smith and Robinson were both arrested and indicted for capital murder.

Approximately six weeks later, while Smith was awaiting trial, the state trial judge asked the prosecutor to have Smith examined by a psychiatrist named James P. Grigson. The judge wanted Dr. Grigson to decide whether Smith was competent to stand trial. No one had ever questioned Smith's competence; the trial judge ordered the examination entirely on his own motion. He later testified that he always ordered such an examination in a capital case. Dr. Grigson spoke to Smith for ninety minutes. Smith was never told that Dr. Grigson was assessing anything but his competence to stand trial, and he cooperated fully. Dr. Grigson did conclude that Smith was competent to stand trial, but he filed no formal report; instead he wrote a letter notifying the trial judge of his conclusion. Judge Porter found that Smith's attorneys were never told that Dr. Grigson had examined their client.[2]

At the beginning of the sentencing hearing, after Smith had been tried and convicted, the prosecution announced that it was resting "subject to reopening." Smith presented three witnesses—his stepmother, his aunt, and the owner of the gun he used in the robbery—and rested. The prosecution then called Dr. Grigson. By this time, the defense attorneys had seen, in the court's file of the case, Dr. Grigson's letter advising the trial judge that Smith was competent, but they did not know that Dr. Grigson was connected to the case in any other way. In fact, before the trial the defense attorneys had obtained an order requiring the prosecution to disclose all the witnesses it planned to use in its case in chief. The state presented a list of witnesses, and the defense successfully moved that the prosecution be prohibited from presenting the testimony of any witnesses not on

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[2]*See* note 5 *infra*.

the list. Dr. Grigson's name was not on the list.

When Dr. Grigson was called at the sentencing hearing, the defense objected and asked that the jury be excused. Defense counsel then conducted a voir dire examination of Dr. Grigson, in which he testified that he had never told the defense attorneys about his interview with their client. He acknowledged, however, that he had discussed his conclusions with the prosecution. He testified that at some time between his examination of Smith and the trial, one of the prosecutors had told him that he might be called to testify against Smith. Then five days before the sentencing hearing, at the very beginning of the trial, the prosecution told him that his testimony would be needed within the week. App. 122. At this point in the voir dire defense counsel moved that Dr. Grigson not be allowed to testify because his name had not been included on the prosecution's witness list. The trial judge denied the motion. The trial judge also agreed that the jury could be told that it was he who had asked Dr. Grigson to examine Smith. The jury was so informed but was never told that the judge has appointed Dr. Grigson only to determine Smith's competence to stand trial, not to decide if he was prone to commit acts of violence.

Dr. Grigson's testimony was extremely damaging to the defendant. He described his extensive qualifications and detailed the five phases of his ninety-minute interview with Smith. He had had no other contact with Smith or with any of Smith's relatives, but on the basis of the interview he concluded that Smith was "a sociopathic personality . . . a very severe sociopath." App. 135, 136. He was "[a]bsolutely . . . convinced that [Smith] is a severe sociopath on the far end of the sociopathic scale." App. 141. Sociopaths, he said, "do not have a conscience that most of us develop at an early age." App. 135. "They will tell the truth if it serves their purpose. If it's harmful, whatever distortion of the truth

is necessary is what they will use." App. 136. And then:

Q No conscience, no remorse, no guilt feelings?

A No. He has none.

Q Now, Dr. Grigson, what is your prognosis in this case?

A Oh, he will continue his previous behavior—that which he has done in the past. He will again do it in the future.

Q All right. So, were he released into society, I take it, then, you would not expect his behavior to differ from what it has been?

A No. If anything it would only get worse.

Q Now, Dr. Grigson, this sociopathic personality that Smith has—is this a condition that will improve with time? I guess—what I'm asking you is this: Is this a stage that he is passing through that he will grow out of?

A No. This is not what you would consider a stage. This is a way of life. Just as you work every day, well his personality comes out in his behavior, but it is not a stage he is going through. It's only something he will continue.

Q You said get worse?

A Yes.

Q If it can?

A Right.

. . . . .

A . . . [I]t's my opinion that really, Mr. Smith does not have any regard for another human being's

property or for their life, regardless of who it may be. This is what makes him such a very severe sociopath. He has complete disregard for another human being's life.

Q Dr. Grigson, does the field of medicine—perhaps psychiatric treatment and/or hospitalization of some sort—does that have anything beneficial to offer someone like Ernest Benjamin Smith?

A We don't have anything in medicine or psychiatry that in any way at all modifies or changes this behavior. We don't have it. There is no treatment, no medicine. Nothing that's going to change this behavior.

Q Now, Dr. Grigson, do you have an opinion as to whether or not there is a probability that the Defendant, Ernest Benjamin Smith, will commit criminal acts of violence that will constitute a continuing threat to society?

A Yes, sir. I have an opinion as to that.

Q And what is that opinion?

A That certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so.

Q Now, Dr. Grigson, I believe you have stated that this man has no remorse or sorrow for what he has done?

A No. He has none.

App. 136-39.

The prosecution called no other witnesses at the sentencing hearing. The jury answered "yes" to all three questions and Smith was sentenced to death.

The Texas Court of Criminal Appeals affirmed Smith's conviction and sentence. *Smith v. State*, 540 S.W.2d 693 (Tex.Cr.App.1976). The United States Supreme Court, over the dissent of three justices, denied certiorari. 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977). On federal habeas corpus, Judge Porter held that Dr. Grigson's testimony violated Smith's sixth and fourteenth amendment right to the effective assistance of counsel, his eighth amendment right to present mitigating circumstances, and his fifth amendment right not to be forced to incriminate himself. *Smith v. Estelle*, 445 F.Supp. 647 (N.D.Tex. 1977). Judge Porter specified several rules that, he said, must be followed in the future to prevent defense attorneys from being unfairly surprised with psychiatrists' reports about the dangerousness of their clients.[3] He held that the results of a psychiatric examination of the defendant's dangerousness could not be admitted at the sentencing phase of a capital trial unless the defendant had been advised, before the examination, that he had a right to remain silent. Our approach is slightly different from Judge Porter's, but we agree with him that Texas violated Smith's constitutional rights, both in the way it introduced Dr. Grigson's evidence and in the way it procured it. We shall address these two matters in turn.

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[3]In the future to insure the right to effective cross examination and the right to effectively defend the case through expert rebuttal testimony, which the due process clause guarantees, defense counsel must be notified that a psychiatric examination will be held on the issue of "dangerousness" the results of which may be used at the penalty phase of the trial. Defense counsel prior to trial, must have meaningful access to the report, now required by state statute, prepared by the psychiatrist stating his findings and conclusions. If the trial court wishes to appoint a psychiatric expert on the issue of dangerousness the order of appointment should so reflect. The testimony of a court appointed psychiatrist and his report would then be equally available to both defense and prosecution for presentation to the jury. However, both sides should have a meaningful right to obtain additional psychiatric experts to either supplement or challenge the conclusions of the court appointed expert.

II.

In *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court reversed a death sentence because the judge who imposed it acted partly on the basis of information that was not disclosed to the defendant or his attorneys. The Court did not deny that in an ordinary case such a procedure might be acceptable. *See id.* at 357, 97 S.Ct. 1197, 1204 (plurality opinion). But "five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." *Id.* For that reason the *Gardner* Court, balancing the benefits of withholding the information against the costs, found that the advantages of confidentiality to the state—obtaining information more easily, avoiding delay, and, if the defendant was not executed, preventing damage to his rehabilitation—were easily outweighed by the damage to "the interest in reliability." *Id.* at 358-60, 97 S.Ct. 1197.[4] This damage was caused by denying the "opportunity for . . . explanation or argument by defense counsel," and for "counsel to challenge the accuracy or materiality of [the] information." *Id.* at 356, 362, 97 S.Ct. at 1204.

Gardner requires us to set aside Smith's death sentence. The defect which the Supreme Court identified in *Gardner*—defense counsel's inability to

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[4]The principles of *Garnder* seem to be derived from both the eighth amendment and the due process clause of the fourteenth amendment. The *Gardner* plurality rested its opinion squarely on the due process clause. *See* 430 U.S. at 351, 97 S.Ct. 1197. But Justice White concurred in the judgment because he thought the eighth amendment compelled the result. *See id.* at 363, 97 S.Ct. 1197 (White, J., concurring). and *Gardner* was clearly adumbrated by *Woodson v. North Carolina*, 428 U.S. 280, 305 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), which rested on the eighth amendment, and perhaps by discussions of the eighth amendment in *Gregg v. Georgia*, 428 U.S. 153, 190, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) and *Jurek v. Texas*, 428 U.S. 262, 271, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (plurality opinion).

challenge or answer the evidence on which the death sentence was based, *see id.*—is conspicuous here as well. As a result Smith's sentencing hearing was at least as unreliable as the proceedings in *Gardner*. And the justifications for the unreliable procedurs were far weaker here.

[1] Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for [defense] counsel to challenge the accuracy or materiality of" evidence, *Gardner v. Florida*, 430 U.S. at 357, 97 S.Ct. at 1204, and in foreclosing "that debate between adversaries [which] is often essential to the truth-seeking function of trials," *id.* at 360, 97 S.Ct. at 1206. Smith's attorneys were manifestly surprised by Dr. Grigson's testimony. They were never notified, according to Judge Porter, the trial judge had ordered a psychiatrist to interview their client.[5] When he had completed his interview, Dr. Grigson filed no report. No copy of the letter stating his conclusions was ever sent to the defense attorneys.[6] And

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[5]Both defense attorneys swore in affidavits that they were never notified that Dr. Grigson had examined their client. The state trial judge, in an affidavit, said "[a]s best I recall, I informed" one of the defense attorneys that Dr. Grigson had been appointed. Judge Porter held no evidentiary hearing but found that the defense attorneys had never been notified. On this appeal the state protests that the state judge's affidavit conflicted with the attorneys', and that Judge Porter could not properly resolve the conflict without an evidentiary hearing. But we need not decide whether the state is correct, because it is undisputed, first, that no formal notification was given; second, that so far as the judge knew, the only purpose of Dr. Grigson's examination was to help decide if Smith was competent; and third, that the defense attorneys had no notice, and no reason to believe, that Dr. Grigson would ever be called to testify.

[6]By happenstance, they saw a copy of the letter while inspecting the court's files in the case, but the letter reflected that Dr. Grigson was appointed to evaluate the defendant's competence to stand trial. Since the defense attorneys claimed that Smith was incompetent, they naturally did not expect Dr. Grigson to testify.

despite the trial court's order that the state's attorney list "all the State's witnesses whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state [sic] and the punishment stage," App. 97, the prosecution did not list Dr. Grigson's name. The consequences of this surprise were devastating.[7] Thus the trial judge's informality

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[7]The Supreme Court in *Gardner* did not attempt to detail the ways in which defense counsel might have explained or challenged the information that was kept confidential, *cf. Davis v. Alabama*, 596 F.2d 1214, 1221-23 (5th Cir. 1979) (in some circumstances, attorneys' failure to prepare adequate defense vitiates state conviction only if it prejudiced defendant). But in this case it is clear that Smith's defense attorneys—whose actual efforts to impeach Dr. Grigson were at best ineffectual, *see, e. g.*, App. 139-41, 146-48, and sometimes damaging to their client, *see, e. g.*, App. 141-43 might, with even minimal preparation, have met Dr. Grigson's testimony in several ways. Had they been able to do even rudimentary research, they would have learned that a Task Force of the American Psychiatric Association concluded that predictions like Dr. Grigson's "are fundamentally of very low reliability."

> Psychiatric expertise in the prediction of "dangerousness" is not established and clinicians should avoid conclusory judgments in this regard.

American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, *Clinical Aspects of the Violent Individual* 23, 33 (1974). The American Psychiatric Association itself, in an amicus brief filed in this case, advised us that Dr. Grigson's "kind of inquiry about long-term future violence essentially does not involve medical analysis, and is not within the realm of established psychiatric expertise." Amicus Br. 10-11. According to one student of the literature, the most that any psychiatrist can predict is that a person "is within a group which, as a whole, poses a comparative greater risk of dangerous behavior than the general population." Dix, the Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics, 5 Am.J.Crim.L. 151, 198 (1977). The APA Task Force agreed. "Predictions of 'dangerousness' are judgments of a 'relative risk' sort, statements of comparative probabilities that are usually quite low." Task Force Report at 27. And, as Judge Porter detailed in his opinion, even such tentative predictions as

and the prosecution's tactics combined to give Smith's

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these are not very reliable. *Smith v. Estelle*, 445 F.Supp. 647, 656-57 (N.D.Tex.1977). Dr. Grigson, of course, was not so restrained. He made a "prognosis" that Smith "will continue his previous behavior—that which he has done in the past. He will again do it in the future . . .. If anything it will only get worse . . .. It's only something he will continue . . .. Nothing [is] going to change this behavior . . .. [*C*]*ertainly* Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so." App. 136-39 (emphasis added). Even a moderately well prepared defense attorney would have had some success in impeaching Dr. Grigson's testimony or offering an opposing view.

Moreover, Dr. Grigson reached his conclusions entirely, *see* App. 149, on the basis of a single ninety minute "mental status examination" of the defendant. The state, summarizing Dr. Grigson's testimony, explains that "[f]rom this mental status examination, [Dr. Grigson] was able to draw opinions not only as to [Smith's] present competency, but also as to his entire mental and emotional composition." Appellant's Br. at 26. One standard textbook flatly asserts that it is medically impossible to draw such conclusions on the basis of a mental status examination. Sands, Psychiatric History and Mental Status, in A. Freedman & H. Kaplan, eds., Comprehensive Textbook of Psychiatry 499 (1977). In addition, if the notions of sociopathy used by Dr. Grigson have any meaning at all—matter of some dispute in the literature, *see, e. g.* E. Sutherland & D. Cressey, Criminology 159-60 (8th ed. 1970)—then before a person may be labelled a sociopath, several elements must be found that Dr. Grigson did not identify in Smith. The American Psychiatric Association's Diagnostic Manual defines "antisocial personality" in this way:

> This term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups, or social values. They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalizations for their behavior.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 43 (2d ed. 1968). There was no evidence that Smith was prone to impulsive behavior, that he had a low

attorneys no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it in any

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"frustration tolerance," or that he tended to blame others or to rationalize his failures. And there was clear evidence that Smith had not come "repeatedly into conflict with society"; he had no history of antisocial behavior, and his only previous criminal conviction was for possessing less than a matchbox full of marijuana. One commentator, discussing Dr. Grigson's testimony in this case, concluded that "the views he expressed stood—generously analyzed—at the fringes of professional acceptability" and that Dr. Grigson "operate[d] at the brink of quackery." Dix, *supra* at 172. Whatever the merit of that view, much of this material, easily available, might have been used to impeach or answer Dr. Grigson's conclusions if Smith's attorneys had had some reasonable time to prepare.

To be sure, as the state points out, Smith's defense attorneys did make some effort to suggest that Dr. Grigson was biased toward the prosecution. Here again, however, their lack of preparation made them ineffective. Smith's lawyer could ask only broad, argumentative questions. *See, e. g.*, App. 139 ("Dr. Grigson, you're kind of the hatchet man down here for the District Attorney's Office, aren't you?"); App. 154 ("Did you ever meet a person you didn't think was a sociopath?"). Again, the most basic research would have disclosed some evidence of bias that might have been used—and under Texas law, *see e. g.*, *Castro v. State*, 562 S.W.2d 252 (Tex.Cr.App.1978); *Evans v. State*, 519 S.W.2d 868 (Tex.Cr.App. 1975); *Smith v. State*, 516 S.W.2d 415 (Tex.Cr.App. 1974); *Wood v. State*, 486 S.W.2d 359 (Tex.Cr.App.1972), could have been used—to impeach Dr. Grigson. For example, even in reported, appellate cases, Dr. Grigson has repeatedly testified for the state, *see, e. g.*, *Bruce v. Estelle*, 536 F.2d 1051, 1054-56 (5th Cir. 1976); *Chambers v. State*, 568 S.W.2d 313, 324-327 (Tex.Cr.App. 1978); *L. L. S. v. State*, 565 S.W.2d 252, 256-57 (Tex.Cr.App. 1978); *Hughes v. State*, 562 S.W.2d 857, 863-64 (Tex.Cr.App. 1978); *Jackson v. State*, 551 S.W.2d 351, 359 (Tex.Cr.App. 1977) (dissenting opinion); *Graham v. State*, 546 S.W.2d 605, 609 (Tex.Cr.App. 1977); *Moore v. State*, 542 S.W.2d 664, 676 (Tex.Cr.App. 1976); *Livingston v. State*, 542 S.W.2d 655, 661 (Tex.Cr.App. 1976); *Gholson v. State*, 542 S.W.2d 395, 400-01 (Tex.Cr.App. 1976); *Hicks v. State*, 525 S.W.2d 177, 180 (Tex.Cr. App. 1975); *Hurd v. State*, 513 S.W.2d 936, 944 (Tex.Cr.App. 1974); *Culley v. State*, 505 S.W.2d 567, 569 (Tex.Cr.App. 1974); *Armstrong v. State*, 502 S.W.2d 731, 735 (Tex.Cr.App. 1974); *Boss v. State*, 489 S.W.2d 580, 582 (Tex.Cr.App. 1972); *Blankenship v. State*, 432 S.W.2d 945, 946-47 (Tex.Cr.App. 1968). He has not appeared in the

significant way. Surprise in this case impaired "the interest in reliability," *id.* at 359, 97 S.Ct. 1197 as much as secrecy did in *Gardner*.[8] Indeed, the sentencing judge

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report of any case as a witness for the defense. On many occations he has declared that a person he examined was a sociopath or was otherwise likely to commit crimes in the future. *See, e. g., Bruce v. Estelle*, 536 F.2d 1051, 1054-56 (5th Cir. 1976); *Chambers v. State*, 568 S.W.2d 313, 324-327 (Tex.Cr.App. 1978); *L. L. S. v. State*, 565 S.W.2d 252, 256-57 (Tex.Cr.App. 1978); *Hughes v. State*, 562 S.W.2d 857, 863-64 (Tex.Cr.App. 1978); *Jackson v. State*, 551 S.W.2d 351, 359 (Tex.Cr.App. 1977) (dissenting opinion); *Moore v. State*, 542 S.W.2d 664, 676 (Tex.Cr.App. 1976); *Livingston v. State*, 542 S.W.2d 655, 661 (Tex.Cr.App. 1976); *Gholson v. State*, 542 S.W.2d 395, 400-01 (Tex.Cr.App. 1976); *Hurd v. State*, 513 S.W.2d 936, 944 (Tex.Cr.App. 1974); *Armstrong v. State*, 502 S.W.2d 731, 735 (Tex.Cr.App. 1974). Frequently he reached this conclusion after he was assigned to examine only for competence or sanity. *See, e. g., Bruce v. Estelle*, 536 F.2d 1051, 1054-56 (5th Cir. 1976); *Livingston v. State*, 542 S.W.2d 655, 661 (Tex.Cr.App. 1976); *Gholson v. State*, 542 S.W.2d 395, 400-01 (Tex.Cr.App. 1976); *Hurd v. State*, 513 S.W.2d 936, 944 (Tex.Cr.App. 1974); *Armstrong v. State*, 502 S.W.2d 731, 735 (Tex.Cr.App. 1974). We dealt with Dr. Grigson's testimony in *Bruce v. Estelle*, 536 F.2d 1051 (5th Cir. 1976). There a habeas corpus petitioner claimed that he had been incompetent to stand trial. Dr. Grigson testified that the petitioner had been competent and was in fact a sociopath, whose apparent symptoms of incompetence were actually part of an attempt to manipulate others. The federal district court relied on Dr. Grigson's testimony and denied relief. We reversed, holding that the reliance on Dr. Grigson's testimony was clear error in view of other psychiatrists' views and their bases.

[8]The state seems to suggest that Smith cannot claim unfair surprise because his attorneys did not attempt to gain more time to prepare by moving for a continuance. At best, this amounts to a claim that Smith forfeited his right to object to the surprise because he did not raise his objection in the proper form. There are abundant reasons to reject this position. First, the state points us to no rule of Texas law saying that moving for a continuance is the only way to object to surprise. Even if there were such a rule, the gross disparity between the actual cross-examination conducted by Smith's attorneys, *see* App. 139-52, 153-54, and the cross-examination they might have conducted if they had requested and received time to prepare, *see* note 7 *supra*, suggest that we should be

in *Gardner* relied upon a presentence report, prepared by the Florida Parole and Probation Commission, *see* Fla.R.Crim.Proc. 3.710-3.713, under conditions that presumably gave some assurance that the reported information would be accurate. Here we deal with testimony offered by one party and not effectively cross-examined by the other; it carries no assurance of reliability whatever.

[2] Similarly, in *Gardner*, the failure to disclose the information had a recognized, substantial justification; under the federal rules, for example, information in a presentence report can be kept from a defendant under certain circumstances. *See* Fed.R.Crim.P. 32(c)(3). And in some cases, procedures which allow the prosecution to surprise the defense may have a similarly strong justification.[9] In this case, however, the price of avoiding

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prepared to excuse the defense attorneys' procedural default in order to avoid "a miscarriage of justice." *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). *See generally Jurek v. Estelle*, 593 F.2d 672, 680-85 (1979), *reh. en banc granted*, 597 F.2d 590 (1979). *See also Smith v. Estelle*, 445 F.Supp. 647, 658 n. 16 (suggesting that if admitting Dr. Grigson's testimony was not error, defense counsel provided ineffective assistance in rebutting it). Even if we cannot excuse the forfeiture in this way, however, Judge Porter held that the state had waived any claims that Smith committed a procedural default, *see Smith v. Estelle*, 445 F.Supp. 647, 659 (N.D.Tex. 1977), and as we say, *see* note 19 *infra*, we are not inclined to disturb his decision.

More fundamentally, however, the defense attorneys' failure to move for a continuance does not distinguish this case from *Gardner*. Here Smith's attorneys at least objected to Dr. Grigson's appearing as a witness; in *Gardner*, the attorneys never asked the trial judge to disclose the confidential information. The Supreme Court invalidated the death sentence nonetheless.

[9]For example, concealing a witness's identity from the defense may, in certain circumstances, be the only way to prevent the witness from being intimidated.

surprise was, at most, the insignificant cost of more regular and formal procedures. Requiring prosecutors and judges to exercise greater care than is shown in this record will scarcely burden them unduly; the surprise in this case resulted, in the first instance, from several minor irregularities that could have been easily corrected. The state trial judge—whom we do not fault for trying to assure himself that the defendant was competent to stand trial—might have ordered the psychiatric examination directly, instead of having a prosecuting attorney contact Dr. Grigson. The trial judge or the prosecutors might have formally notified the defense attorneys of Dr. Grigson's examination. Or the prosecution might have listed Dr. Grigson's name as a prospective witness. Even if we assume that their failure to list Dr. Grigson was inadvertent, Judge Porter's holding would follow *a fortiori* from *Gardner*; the gains from informality and relaxed procedures cannot possibly outweigh the risk that the state may execute a person who would not have been sentenced to death if the jury had had full and "accurate sentencing information"—"an indispensable prerequisite to a reasonable determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859 (1976) (plurality opinion).[10]

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[10]The appellant insists that Smith did not exhaust his state remedies on this issue. This is a mystifying claim. In its answer to Smith's federal habeas petition the state expressly abjured any contention that Smith had failed to exhaust. App. 45-46. In its reply brief on this appeal the state concedes that Smith's petition for federal habeas corpus exactly duplicated the allegations in his state appeal and state petition for habeas corpus. Appellant's Reply Br. at 2. On direct appeal, Smith had claimed that Dr. Grigson's surprise testimony denied him a fair trial, *see* App. 159-60; *Smith v. State*, 540 S.W.2d 693, 699 (Tex.Cr.App. 1977). In his state habeas petition he asserted:

> The introduction of the testimony of Dr. Grigson at petitioner's trial violated his privilege against self-incrimination and his rights to fair notice and the effective assistance of counsel

But Judge Porter found that the prosecutors intentionally ommitted Dr. Grigson's name from the witness list. In other words, they intended to surprise the defense attorneys and leave them, at best, not fully prepared. The state claims that Judge Porter's finding is clearly erroneous but it is plainly supported by the record. Dr. Grigson testified that a prosecuting attorney had alerted him, some time before the trial, that he might be called as a witness. At the beginning of the week-long trial, the same prosecutor asked him to stand ready because the prosecution "would probably need him to testify this week." App. 122. Then at the start of the sentencing hearing, the prosecution, which was entitled to present witnesses first, rested, "subject to the right to reopen." It is difficult to resist the conclusions that the prosecution was attempting to lay a foundation for the argument—ultimately accepted by the Texas Court of Criminal Appeals, *see Smith v. State*, 540 S.W.2d 693, 699 (Tex.Cr.App.1976), and apparently by the trial judge—that Dr. Grigson was a rebuttal witness, not a witness to be used on the case in chief, so his omission from the witness list did not violate the trial judge's order. Whatever the merits of this view,[11] the

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secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States

and said that Dr. Grigson's surprise appearance "prevented petitioner's trial counsel from effectively defending against the charge that there existed a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society." App. 220. That Smith did not anticipate the precise arguments Judge Porter used in support of his decision to grant relief obviously does not mean he failed to exhaust his remedies.

[11]The defense presented no psychiatric evidence or expert testimony of any kind, so it is not clear what Dr. Grigson was rebutting. In any event, the prosecution rested its case in brief subject to the right to *reopen*—that is, presumably, to reopen its case in chief—and said nothing about rebuttal evidence. In this way the state avoided having to explain exactly whom or what Dr. Grigson's testimony was offered to refute.

prosecution's unusual actions at the sentencing hearing only support Judge Porter's conclusion that the prosecutors were deliberately attempting to surprise the defense attorneys and to force them to examine Dr. Grigson while they were unprepared.[12]

This is irresponsible conduct. It lacks even the meager benefits some might credit to informality. We have reversed a conviction in a non-capital case where the government's similarly inexcusable surprise tactics left defense counsel unable to cross-examine meaningfully. *See Riggs v. United States*, 280 F.2d 750, 753-54 (5th Cir. 1960). And the Supreme Court has commented that even a defendant has no right to treat a criminal trial as "a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970). At the sentencing phase of a capital trial, *Gardner* and other cases, *see e.g., Woodson v. North Carolina*, 428 U.S. 280, 304-305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), demand extraordinarily fair and reliable procedures. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion); *see Gardner v. Florida*, 430 U.S. 349, 357-59, 97 S.Ct. 1197, 51 L.Ed.2d 393 (plurality opinion); *id.* at 363, 97 S.Ct. 1197 (White, J., concurring). To some extent, at least, a state's decision to kill a person must be insulated from the vagaries of the criminal process. "It

[12]The state's explanation, in its brief on this appeal, is that the prosecutors rested because they knew Dr. Grigson would not be available to testify until later in the penalty trial. This suggestion lacks support in the record and, in any event, is wholly immaterial; it does not make Dr. Grigson a rebuttal witness, *see* note 11 *supra*, and obviously it does not excuse the state's failure to list him.

is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977) (plurality opinion). For these reasons, the death sentence imposed on Smith cannot stand.

III.

No one ever told Smith that Dr. Grigson's examination concerned more than Smith's competence to stand trial. No one ever revealed that their ninety-minute interview would be used to gather the evidence that would send Smith to his death. These facts are undisputed and they prompted Judge Porter to hold that the state's using Dr. Grigson's testimony would have violated Smith's fifth amendment right not to incriminate himself even if there had been no surprise. More specifically, Judge Porter ruled that "if the State or Court seeks to have the Defendant examined by the psychiatric expert on the issue of dangerousness, the Defendant must be advised he has a right to remain silent. If the Defendant indicates that he wishes to exercise that right, he may not be questioned by the psychiatrist for the purpose of determining dangerousness." *Smith v. Estelle*, 445 F.Supp. 647, 664 (N.D.Tex.1977).

[3] Before we decide whether such warnings are required, however, we must consider the logically prior issue of whether Smith even had a right to refuse to be examined by Dr. Grigson.[13] Ordinarily there would be

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[13]If Texas retried Smith, Part II of this opinion, standing alone, would permit it to use the same testimony from Dr. Grigson, based on the same examination of Smith, provided it gave adequate notice to the defense attorneys. As Judge Porter's opinion thoroughly shows however, there is a serious question about whether Dr. Grigson's testimony was obtained by violating Smith's fifth and sixth amendment rights; if it was, of course, it is not admissible in any event. Under Texas law, evidence like Dr. Grigson's in this case

no question; under the fifth amendment a criminal defendant of course cannot be forced to discuss his alleged crime with anyone who is able to use his statements as evidence against him at his trial. But the state insists that when the defendant is facing jury deciding whether to impose a death sentence, this rule does not apply, at least so long as the interrogator is a psychiatrist.

The state argues first that the evidence Smith gave Grigson is not "testimonial" and therefore not within the fifth amendment privilege. *See Livingston v. State*, 542 S.W.2d 655 (Tex.Cr.App.), *cert. denied* 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977). The Supreme Court has held that a criminal defendant may be compelled to wear a piece of clothing in order to show that it fits him, *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910), to give a blood sample, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), or a handwriting, *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), or voice exemplar, *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), or to speak so that a witness may hear his voice quality or tone, *United States v. Wade*, 388 U.S. 218, 222-23, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). In these cases, the Court said, evidence given by the defendant was not "relat[ed] to some communicative act," *Schmerber v. California*, 384 U.S. at 765, 86 S.Ct. 1826, and was not "used . . . for the testimonial or communicative content of what was to be said," *United States v. Dionisio*, 410 U.S. at 7, 93 S.Ct. at 768. Had Dr. Grigson drawn his conclusion from Smith's manner or deportment, his attention span or facial expressions, a strong argument might be made

is apparently admissible, *see, e. g., Livingston v. State*, 542 S.W.2d 655 (Tex.Cr.App.), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977), so if Smith were convicted or sentenced on the basis of that evidence another federal collateral proceeding, raising the fifth and sixth amendment issues, would be inevitable. Since the issues have been briefed and argued, and were decided by Judge Porter, we see no reason not to resolve them here.

that he gathered only evidence like that involved in these cases. If Dr. Grigson had been analyzing only the patterns of the defendant's speech, his grammar, organization, logical coherence, and similar qualities, the question would be closer but arguably the fifth amendment would still not apply. But as we have said, Dr. Grigson's diagnosis of Smith rested principally on his conclusion that Smith showed no remorse; obviously Dr. Grigson drew that conclusion from the content of Smith's statements to him. Indeed, Dr. Grigson testified, on cross-examination, that the most important basis of his diagnosis was the account of the crime which Smith gave him during their interview. App. 142-43. Dr. Grigson accepted that account as accurate and drew his conclusions accordingly, App. 192; he also based his diagnosis on comments Smith made and failed to make while he was recounting the crime, App. 142-43. Plainly, then, Dr. Grigson—and therefore the prosecution, when it called him as a witness—used the content, not the non-testimonial aspects of Smith's statements.

The state also argues that *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976), entitles it to force Smith and other capital defendants to undergo a psychiatric examination designed to decide whether they are likely to commit violent crimes in the future. In *Cohen*, we held that a defendant can be required "to submit to an examination by psychiatrists selected by the government to determine his *sanity* at the time of the commission of the crime." *Id.* at 47 (emphasis added). But far from supporting the state's position, *Cohen* furnishes excellent arguments against it; our decision in *Cohen* rested on two premises, and neither applies when the compelled psychiatric examination concerns not the defendant's sanity but his propensity to be violent in the future. The first premise was that a psychiatrist's conclusions about a defendant's sanity rested on the non-testimonial aspects of the defendant's conduct during the examination, *see* 530 F.2d at 48; for the reasons we

have just given, Dr. Grigson's conclusions about the defendant's future dangerousness were based almost entirely on the defendant's statements. Indeed at times they appeared to be not just the fruits of Smith's statements but summaries of them.[14] The second and more important premise of *Cohen* was that if a defendant raises insanity as a defense, and introduces psychiatric testimony, "the government will seldom have a satisfactory method of meeting defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects . . . who has had the opportunity to form a reliable opinion by examining the accused." *Id.* at 48; *see United States v. Albright*, 388 F.2d 719, 724-25 (4th Cir. 1968). At most, this rationale of *Cohen* implies that a defendant who introduces the results of a psychiatric examination at the sentencing phase of a capital trial must submit to an examination by a psychiatrist nominated by the state.[15] But it is undisputed that Smith never used psychiatric evidence and never suggested that he might. This second premise is therefore also inapposite. In *Cohen*, the defendant himself raised the insanity defense and intended to present psychiatric evidence of his own; a psychiatric examination of such a defendant is utterly unlike an examination initiated by the state or the court, designed to determine not the defendant's sanity but his future dangerousness, and offered in an affirmative effort to have the defendand sentenced to death, rather than as a response to the defendant's own psychiatric evidence.

[14]The crucial portions of Dr. Grigson's testimony were his statements that Smith showed "no guilt feelings, no remorse, no sorrow," and the like; these may be not just conclusions drawn from Smith's statements but actually reports or summaries of the statements themselves. In either case, of course, the fifth amendment would require Dr. Grigson's evidence to be suppressed if Smith's statements were not voluntary.

[15]Judge Porter imposed such a rule. *See Smith v. Estelle*, 445 F.Supp. 647, 663 (N.D.Tex. 1977). Because Smith did not attempt to use any psychiatric evidence, however, we need not decide whether Judge Porter's quite plausible view is correct.

For these reasons, *Cohen* does not suggest that evidence from a compelled psychiatric examination can be used by the state in its efforts to show the defendant's future dangerousness.

Preventing the prosecution from relying on compelled psychiatric examinations will scarcely disable it from proving the defendant's dangerousness in appropriate cases. Many defendants may consent to examinations in the hope of being exonerated or of escaping a death sentence. As we have said, we leave open the possibility that a defendant who wishes to use psychiatric evidence in his own behalf can be precluded from using it unless he is willing to be examined by a psychiatrist nominated by the state. Moreover, the inquiry demanded by Texas's second question is not obviously a matter for psychiatrists.[16] There seems to be a consensus among psychiatrists that any long-term predictions of future violence must be very tentative if, indeed, they can be made at all. *See, e. g.*, American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, Clinical Aspects of the Violent Individual 23, 33 (1974); note 7 *supra.* Indeed, many in the psychiatric community apparently believe that nothing about a psychiatrist's training or skill qualifies him to predict how dangerous a person will be in the distant future. *See* note 7 *supra.* Dr. Grigson evidently thinks otherwise, but even he conceded that the

[16]In this way, too, the inquiry under Texas's second question differs sharply from the issue raised by an insanity defense. This Circuit's law on insanity is, in relevant part,

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Blake v. United States, 407 F.2d 908, 916 (5th Cir. 1969) (en banc). The very language of this definition—"mental disease or defect," "substantial capacity," and the like—point to the role of the psychiatrist or psychologist.

"sociopathic personality disorder" be diagnosed in Smith "is not an illness or a sickness. It's simply a descriptive term that does describe an individual that has certain characteristics." App. 135. Moreover, when Dr. Grigson explained how he had concluded that Smith was a sociopath, he often reasoned in ways that manifestly required no expertise.[17]

More important, however, is the legal meaning which the United States Supreme Court has, in effect, given to Texas's second question. In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court refused to hold Texas's capital sentencing statute unconstitutional on its face. Responding to arguments that the second question asked for a prediction that experts could not make, the Court said:

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[17]Q Would you say, being a psychiatrist, that a person could have been frightened or in a daze or state of shock, and that would have caused him to act in such a way as Ernest Benjamin Smith did?

A Well, certainly. Yeah. I think if I had shot somebody I would certainly be in a daze or state of shock. But, you know, I think that if I were in that sort of situation I would probably be frightened and run like the devil. I wouldn't step over the body to get the money. I would want to get out of there. But an individual that is involved in, say, a goal directed fashion certainly is not functioning in a daze or shock type state.

. . . . .

Q Would it make any difference in your evaluation of Ernest Benjamin Smith if you thought or believed that he felt that he was not responsible for Mr. Moon's death? Would that make any difference with regard to his remorse?

A But, you know, he was. He at least stated he picked out the store. You know he chose it. He was in there, so he was responsible. So, I feel like that—you know, certainly he should feel remorse.

App. 143-44, 151-52.

> [P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice.

Id. at 275-76, 96 S.Ct. at 2957-2958. While the Court did not disapprove the use of psychiatric testimony, then, *see id.* at 273, 96 S.Ct. 2950, it did say that the second question was constitutionally acceptable precisely because it could be resolved by non-experts.

Moreover, the Court clearly held that the Texas procedure would have been unconstitutional if the second question did not present issues to which a psychiatrist's expertise was unquestionably irrelevant. In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), decided the same day as *Jurek*, the Court held that a capital sentencing procedure would violate the eighth amendment if it did not give a defendant an opportunity to present at least some mitigating circumstances. Texas's procedure did not explicitly provide such an opportunity, but the Court concluded that Texas "will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." *Jurek v. Texas*, 428 U.S. 262, 272, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929

(1976). On this understanding, the Court upheld the Texas procedure. *Id.* at 272-74, 96 S.Ct. 2950. In order to be constitutional, then, Texas's second question must reach far beyond a psychiatrist's expertise to issues that are quite essentially the domain of lay persons. *See Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968) ("[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.")[18]

[18]In fact, the logic of the Court's decision in *Jurek* suggests that the second question must be interpreted to mandate an even broader inquiry to which a psychiatrist's expert knowledge is even less relevant. The Court held that the death penalty would be unconstitutional if it were "so totally without penological justification that it result[ed] in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 929-30, 49 L.Ed.2d 859 (1976). But, the Court said, capital punishment as Texas administers it "is not without justification and thus is not unconstitutionally severe," *id.* at 187, 96 S.Ct. at 2931, *see Jurek v. Texas*, 428 U.S. 262, 274, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The Court identified two justifications, "retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. at 183, 96 S.Ct. at 2929. But it is not clear why killing offenders who are likely to "commit criminal acts of violence that would constitute a continuing threat to society" is more likely to deter others in the future, *see* The Supreme Court, 1975 Term, 90 Harv.L.Rev. 56, 71-72 (1976), than an equal number of random executions—a system that the Court presumably would not tolerate, *see Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Executing particularly "dangerous" criminals would serve to prevent *them* from committing crimes in the future, but the Court declined to rely on this sort of prevention as a justification for capital punishment, *Gregg v. Georgia*, 428 U.S. at 183 n. 28, 96 S.Ct. 2909, and the reason is apparent: a desire to prevent recidivism does not justify a legislature's decision to kill an offender rather than to imprison him for life with no possibility of parole, and the Court had made it clear that the unique severity of capital punishment makes it necessary to justify that choice. *See, e. g., id.; Furman v. Georgia*, 408 U.S. 238, 312-13, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (White, J., concurring). It follows, then, that Texas's second question must be seen as an effort to promote the goal of retribution, or "an

Finally, any attempt to compel defendants to submit to a psychiatric inquiry into their dangerousness is likely to be erratic and capricious. Such an examination evidently cannot succeed unless the defendant cooperates; Dr. Grigson for example, testified that Smith had cooperated with him. No one has suggested that a psychiatrist examining a defendant for future dangerousness can simply observe him, as a psychiatrist concerned with insanity might. Nor can a defendant be physically forced to cooperate with an examining psychiatrist, as he can, for example, with a doctor extracting a blood sample or a policeman who is fingerprinting him. Civil contempt is unlikely to move a defendant who is contemplating the sentencing phase of a capital trial. A defendant can be barred from pleading insanity if he did not submit to an examination by the state's psychiatrist or psychologist; as we have said, we leave open the possibility that a defendant might be precluded from presenting psychiatric evidence of his own if he does not agree to be examined by a psychiatrist chosen by the state. But no such sanction is available against a capital defendant who, like Smith, proposes to use no such evidence. The state might, of course, be

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expression of society's moral outrage at particularly offensive conduct." *Gregg v. Georgia*, 428 U.S. at 183, 96 S.Ct. at 2930. The Court explained these notions by saying that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* at 184, 96 S.Ct. at 2930. The Court must have been saying, then, that the justification for imposing the death sentence on particularly dangerous offenders is that it allows the jury to express its belief, on behalf of the community, that killing the defendant is "the only adequate response." If this is the task which Texas's second question presents to the jury, then the jury must, in answering that question, simply ask itself whether the defendant deserves to die. A psychiatrist's diagnosis and predictions are apparently relevant to this horrifying inquiry, but only peripherally, and forcing the government to rely on lay evidence—at least when the defendant himself is not relying on experts—will not significantly hinder it.

permitted to comment on the defendant's refusal to be examined by a psychiatrist. But it is not clear what the jury is to infer; surely in most cases it would be unwarranted to conclude that the defendant knew the clinical details of his psychiatric state and did not want them discovered. And simply mentioning the defendant's refusal to be examined and allowing the jury to draw its own conclusions might clash with the Supreme Court's insistence that capital sentencing procedures be unusually reliable, *see* Part II *supra*. In any event, it is unlikely that the threat of such a remark by the prosecution will induce any well-informed defendant to submit to an examination by a psychiatrist who habitually testifies for the state and who is likely to give an emphatic affirmative answer to the precise question before the jury.

The principal significance of allowing compelled examination on the question of dangerousness, then, will be in cases like Smith's. If the state is entitled to compel a defendant to submit to an examination, it can, in an effort to gain the defendant's cooperation, mislead him or indeed lie to him about the significance of the examination; it can take advantage of his ignorance or lack of understanding. It can coerce him in any way that does not make his statements less useful to the interrogating psychiatrist. Psychological pressure, sharp practices, and deceit are likely to be, in effect, the means of compelling examinations. These tactics are inherently discriminatory. A knowledgeable defendant, or one with vigilant attorneys, will either simply refuse to submit to an examination or will bargain with the state to have the examination conducted by a psychiatrist who is more likely to favor the defense. Only defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state.

[4-6] We have every reason, therefore, to give effect to the apparent command of the fifth amendment and to hold that a defendant may not be compelled to speak to a

psychiatrist who can use his statements against him at the sentencing phase of a capital trial.[19] If a state wishes to prove a defendant's propensity to commit future crimes of violence by using evidence gathered at a psychiatric examination, the defendant must voluntarily consent to the examination. It follows that Judge Porter was correct when he held that if a defendant indicates that he wishes to remain silent, "he may not be questioned by the psychiatrist for the purpose of determining dangerousness." Judge Porter also held that the defendant must be warned that he had a right to remain silent; since Smith was in custody when he was interviewed, this holding, too, was correct. *Compare Schnekloth v. Bustamonte*, 412 U.S. 218, 232, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) *with Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We also agree with Judge Porter's holding that a defendant has no constitutional right to have an attorney present during a psychiatric evaluation of his dangerousness. Here Judge Porter followed *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976), which held

[19]The state asserts that Smith forfeited his fifth and sixth amendment claims by not raising them when he objected to Dr. Grigson's testimony at the sentencing phase. There are three sufficient answers. First, in the habeas proceeding in federal district court, the state did not raise this argument in the pleading or at any time until it moved for a new trial. Judge Porter held that this constituted a waiver, *see Smith v. Estelle*, 445 F.Supp. 647, 659 (N.D.Tex. 1977), and we are not disposed to disagree. *See LaRoche v. Wainwright*, 599 F.2d 722, 724 (1979). Second, Texas courts interpreted the fifth and sixth amendments to permit testimony like Dr. Grigson's to be admitted, *see, e. g., Livingston v. State*, 542 S.W.2d 655, 661-62 (Tex.Cr.App. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2 250 (1977); we have held that the apparent futility of objecting to an alleged constitutional violation excuses a failure to object. *See Rummel v. Estelle*, 587 F.2d 651, 653-54 (5th Cir. 1978) (en banc), *cert. granted*, ___ U.S. ___, 99 S.Ct. 2403, 60 L.Ed.2d 1064 (1979). Third, Smith's objection was, after all, essentially surprise, *see* note 8 supra; his counsel can scarcely be faulted for failing to enumerate all of the many constitutional rights that the state violated when it unexpectedly presented Dr. Grigson's testimony.

that there was no right to have an attorney present when the examination was to decide if the defendant was sane. *See id.* at 48. Judge Porter reasoned, as we had in *Cohen*, that an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination. *See id.* In this he was correct. But Judge Porter overlooked the role that an attorney might have played in helping a client like Smith decide whether he wished to submit to an examination. This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1933). The Supreme Court has spoken of the "vital need" for counsel "at the pretrial stage," and has said that "whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 423 (1977), *quoting Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Smith, of course, had been indicted when Dr. Grigson examined him; indeed, an attorney had been appointed to

represent him. And the Supreme Court has repeatedly held that a defendant is entitled to the assistance of counsel when he faces decisions that may have a crucial effect on his trial. *See, e. g. Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961). *See also Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1933). We therefore hold that at the sentencing phase of a capital trial, Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination. Smith was denied these rights; for this reason, too, his death sentence must be set aside.[20] The judgment of the district court is

AFFIRMED.

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[20]In this appeal, Smith did not allege any errors that would undermine his conviction, and we understand Judge Porter to have held simply that Smith cannot be executed. We affirm his judgment on that understanding. We of course leave to state authorities any questions that arise about the appropriate way to proceed when the state cannot legally execute a defendant whom it has sentenced to death.

APPENDIX B

The Fifth Amendment to the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 37.071, sections (a) and (b)(2) are as follows:

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

* * *

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

* * *

Supreme Court, U. S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

VOLUME I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

No. 79-1127

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

PETITION FOR CERTIORARI FILED
JANUARY 21, 1980
CERTIORARI GRANTED
MARCH 17, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 28, 1973 — Indictment issued by the Grand Jury of Dallas County, Texas.

Mar. 11, 1973 — Jury voir dire commenced.

Mar. 25, 1973 — Jury trial commenced on plea of not guilty to capital murder.

Mar. 26, 1973 — Jury returned verdict of guilty to capital murder.

Mar. 26, 1973 — Punishment hearing commenced.

Mar. 26, 1973 — Jury returned verdict of "yes" to each of the three special issues. Punishment set by the court at death.

Feb. 18, 1976 — Opinion of Texas Court of Criminal Appeals affirming conviction and sentence.

July 14, 1976 — Appellant's motion for rehearing overruled. Prior dissenting opinions withdrawn.

Oct. 20, 1976 — Smith sentenced to be executed on November 22, 1976.

Nov. 6, 1976 — Stay of execution pending timely filing of petition for writ of certiorari granted by Mr. Justice Powell.

Mar. 7, 1977 — Certiorari denied.

Mar. 22, 1977 — Smith sentenced to be executed on April 26, 1977.

Apr. 18, 1977 — Application for state writ of habeas corpus filed.

Apr. 20, 1977 — State writ of habeas corpus denied.

Apr. 21, 1977 — Petition for Writ of Habeas Corpus by a person in state custody filed in United States District Court, Dallas Division, CA-3-77-0544-F.

Apr. 22, 1977 — Stay of execution pending further order of the court granted by Robert W. Porter, United States District Judge.

Apr. 29, 1977 — Show cause order filed and report requested from Petitioner detailing factual issues.

May 23, 1977 — Respondent's Motion to Dismiss and Answer filed along with Texas Court of Criminal Appeals records.

Aug. 25, 1977 — Letter from counsel for Petitioner setting forth factual issues disputed.

Oct. 6, 1977 — Letter from court to Petitioner's counsel requesting affidavits with copy to Respondent's attorney.

Oct. 12, 1977 — Filed Affidavits of John F. Simmons and Howard G. Wilson.

Oct. 21, 1977 — Filed Affidavit of Judge R. T. Scales.

Dec. 21, 1977 — Letter of John F. Simmons confirming telephone request for additional affidavit.

Dec. 21, 1977 — Filed Affidavit of John F. Simmons.

Dec. 30, 1977 — Filed Memorandum Opinion and Final Judgement vacating death sentence.

Jan. 9, 1978 — Filed Respondent's Motion for New Trial.

Feb. 10, 1978 — Filed Petitioner's Response in Opposition to Respondent's Motion for New Trial.

Mar. 27, 1978 — Filed Order denying Respondent's Motion for New Trial.

Apr. 4, 1978 — Filed Notice of Appeal by W. J. Estelle, Jr., Director, Texas Department of Corrections and Motion for Stay of Order.

Apr. 18, 1978 — Original case papers mailed to Court of Appeals with Transcript and State Court Records.

Sept. 13, 1979 — Opinion of United States Court of Appeals for the Fifth Circuit affirming United States District Court.

Oct. 22, 1979 — Rehearing and Rehearing En Banc denied.

IN THE 195th JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

No. C 73-12659 IN

[Record on Appeal (hereafter "Rec."), page 21]

Motion To List State's Witnesses —
Filed January 4, 1974

TO THE HONORABLE JUDGE OF THE COURT:

The Defendant in the above styled and numbered cause moves this Honorable Court to order the Attorney representing the State of Texas in this cause to list on the back of the indictment all of the State's witnesses upon whose testimony the indictment was found for the reason that the Defendant has no way of knowing the identity of witnesses appearing before the Grand Jury and no other means of knowing upon whose testimony the indictment was returned other than the complaint.

I.

The Defendant further moves this Court to order the Attorney representing the State of Texas in this cause to list all the State's witnesses whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state and the punishment stage, for the reason that the Defendant has no way of knowing the existence of any relationships between such witnesses and the prospective jurors and the Defendant cannot make an intelligent use of his peremptory challenges without such knowledge.

WHEREFORE, PREMISES CONSIDERED, Defendant moves the Court to grant this Motion in all things.

Respectfully submitted,
/s/ John F. Simmons,
Attorney for Defendant
1113 Davis Building
Austin, Texas 75202
747-1133

ORDER

On this the _____ day of _____, _____, the foregoing Motion was presented in open court and the request to list all the State's witnesses whom the State expects to use during the guilt or innocence stage is (GRANTED) ~~(DENIED)~~ to which action of the Court the defendant then and there excepted in open court.

/s/ R. T. Scales
JUDGE

ORDER

On this the _____ day of _____, 19____, before the trial has commenced, the foregoing Motion was presented in open court and the request to list all the State's witnesses whom the State expects to use during the punishment stage is (GRANTED) ~~(DENIED)~~ *if known* to which action of the Court the defendant then and there excepted in open Court.

/s/ R. T. Scales
JUDGE

ORDER

After the jury returned a verdict of guilty but prior to the hearing on punishment the foregoing Motion with respect to the request to list the State's witnesses whom the State expects to use during the punishment stage was again presented in open Court which is (GRANTED) (DENIED) to which action of the Court the defendant then and there excepted in open court on this the _____ day of _____, 19____.

_____
JUDGE

* * *

[Rec. 24]

February 28, 1974

Honorable R. T. Scales, Judge
195th Judicial District Court
4th Floor
Dallas County Government Center
Dallas, Texas 75202

Re: Ernest Benjamin Smith, Jr.

Dear Judge Scales:

The following is a summary of the psychiatric evaluation of Ernest Benjamin Smith, Jr. which took place on the eighth floor of the Dallas County Jail on 2/18/74.

GENERAL APPEARANCE & BEHAVIOR: Mr. Smith is a 26-year old colored male. He had pigtails, mustache, goatee, mole in his right temporal area, birthmark over his left cheek and a small tattoo on his left hand. His behavior was normal.
PRODUCTION OF SPEECH: He was able to reach goal ideas easily.
AFFECT & MOOD: There were no guilt feelings.
CONTENT OF THOUGHT: Mr. Smith was able to discuss the charges against him with me. He was able to give historical information. No delusions nor hallucinations were elicited.
SENSORIUM: He was oriented to time, place and person. He is of average intelligence.

In conclusion, it is my opinion that Earnest Benjamin Smith, Jr. is aware of the difference between right and wrong and is able to aid an attorney in his defense. If I can be of any further help to you regarding this case, please let me know. He is a severe sociopath.

Sincerely,
/s/ James P. Grigson, M.D.

JPG/cc

* * *

[Rec. 25]

List of Witnesses — Filed March 11, 1974

1. Louie Anderson
2. Troy Brown
3. E. C. Carlan
4. Wes Cason
5. L. C. Caudell
6. Joe Chasteen
7. J. C. Day
8. B. J. Haston
9. N. D. Emberlin
10. C. E. Lewis
11. James Mitchell
12. C. O. Prewitt
13. Milton Rankin
14. J. A. Reeves
15. Andrew Swift
16. Faye Spruill
17. George Wheeler
18. John Wilson

Copy given to deft. attorney

A-8

Form 391-Application for Subpoena in the District Court

TO THE CLERK OF THE CRIMINAL DISTRICT COURT ..... OF DALLAS COUNTY, TEXAS:

In The Case of THE STATE OF TEXAS vs. Ernest Ben Smith

No. C73-12659 charged with Capital Murder

..... Date set for trial

you will please issue subpoena in accordance with the law, for the following named witness residing in the County, as set out:

1. Book-in records custodian Dallas Sheriff's
whose vocation is that of residing in , County, Texas, ~~and whose location is~~ record of visitation of Dr Grigson to Ernest Ben Smith

2. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

3. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

4. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

5. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

6. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

7. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

8. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

9. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

10. .....
whose vocation is that of residing in , County, Texas,
and whose location is .....

The testimony of said witness is believed to be material to the ~~State~~ Defendant.

John F. Simmons

SWORN TO AND SUBSCRIBED before me, this 25 day of March A. D. 19 74

MAR 25 1974

BILL SHAW

Clerk, Criminal District Court ..... Dallas County, Texas.

By ..... Deputy

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* * *

[Rec. 66]

NO. C73-12659 IN

THE STATE OF TEXAS	)	IN THE 195th JUDICIAL
VS.	)	DISTRICT COURT OF
ERNEST BEN SMITH	)	DALLAS COUNTY, TEXAS

Defendant's Motion In Limine —
Filed March 25, 1977

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW defendant and objects in advance to the testimony of any witness to testify in the State's case-in-chief whose name is not listed on the State's list of witnesses, and asks that the State of Texas not put such a witness on the witness stand.

I.

Prior to jury selection, defendant made a motion that the State be required to list *all* its witnesses to be used *on its case in chief*, "for the reason that the defendant has (SIC) no way of knowing the existence of any relationships between the witnesses and prospective jurors . . . ." This Motion was granted. The State did in fact file and present a list of witnesses to defense counsel.

WHEREFORE, defendant prays that this Motion be granted,

Respectfully Submitted,
JOHN F. SIMMONS,
HOWARD G. WILSON
Attorneys for Defendant
by /s/ John F. Simmons

ORDER

This Motion is (Granted) ~~(Denied)~~.

/s/ R. T. Scales
JUDGE

NO. C-73-12659-IN

THE STATE OF TEXAS	)(	IN THE 195TH JUDICIAL DISTRICT
VS.	)(	COURT OF DALLAS COUNTY, TEXAS
ERNEST BENJAMIN SMITH, JR.	)(	JANUARY TERM, A.D., 1974

Statement Of Facts (Hereinafter S/F)

APPEARANCES:

HON. HENRY WADE, Criminal District Attorney, Dallas County, Texas
By: Mr. Steve Tokoly, Assistant District Attorney,
Mr. Doug Mulder, Assistant District Attorney,
Mr. Winfield Scott, Assistant District Attorney, and
Mr. Gerald Banks, Assistant District Attorney,

For the State of Texas;

MR. HOWARD WILSON, Attorney-at-Law,
and
MR. JOHN SIMMONS, Attorney-at-Law,

For the Defendant.

- - -

BE IT REMEMBERED that on the 11th day of March, A.D., 1974, came on to be heard before the HONORABLE R. T. SCALES, Judge of the 195th Judicial District Court of Dallas County, Texas, and a jury, the above entitled and numbered cause at which time the Defendant was arraigned outside the presence of the jury, pled not guilty and whereupon the Indictment was presented in the presence of the jury and the Defendant again pled not guilty, the Rule of Evidence was invoked by the Defendant and the following testimony was adduced from the witness stand and the following proceedings had, to-wit:

* * *

[S/F 2768]

(Whereupon the jury retired to the jury room to deliberate their verdict on the question of guilt or innocence and subsequently returned to the courtroom with their verdict, which was received and accepted by the Court at which time the jury was recessed until 3:30 P.M. and the following proceedings were had outside the presence and hearing of the jury.)

THE COURT: As I understand it, Mr. Mulder, you're going to rest — how do you want to word it? Subject to the right to reopen?

MR. MULDER: Whatever your pleasure is. However, I don't think they're going to know one way or the other. We can do it right now. They can come in, and the Defense and be calling witnesses?

THE COURT: Mr. Simmons?

MR. SIMMONS: I didn't understand.

THE COURT: He doesn't have any testimony right now, but will have.

MR. MULDER: We will rest right now in the record.

THE COURT: Subject to your right to reopen [S/F 2769] if they don't put on any testimony?

MR. TOKOLY: I think since we are permitting them to go first, if they can start putting on their testimony as if that's the normal thing to do, then we will put on our testimony after theirs.

THE COURT: That's fine. Since the State had the right to go first, I wanted to show something in the record concerning your resting at this time.

MR. MULDER: That's fine, Judge, with that understanding.

(Whereupon the jury returned to the courtroom and the following proceedings were had in the presence and hearing of the jury:)

MR. SIMMONS: Judge, at this time we will call Robert Terry Roy.

* * *

[S/F 2782] MR. MULDER: We will call Dr. James P. Grigson.

MR. SIMMONS: May we have a hearing on Dr. Grigson outside the presence and hearing of the jury?

THE COURT: Yes, sir.

Members of the jury, please retire to the jury room.

(Whereupon the jury was retired to the jury room, and the following proceedings were had outside the presence and hearing of the jury.)

THE COURT: Mr. Simmons, what is the purpose of the hearing out of the presence of the jury?

MR. SIMMONS: I think it will take about four questions, and it will be apparent.

THE COURT: Four questions by you or Mr. Mulder?

MR. SIMMONS: By me.

THE COURT: Go ahead.

MR. SIMMONS: First, we want to make a Motion in Limine in advance that the State not be allowed to mention or say that Dr. Grigson was appointed by the Court. We feel like that would be a comment on the weight of the evidence with regard to the jury.

THE COURT: All right.

MR. SIMMONS: Is that motion granted?

[S/F 2783] THE COURT: Yes.

MR. MULDER: We would like to be heard on that. I think it's pertinent.

THE COURT: As to whether or not I appointed him?

MR. MULDER: Yes, sir.

THE COURT: Why?

MR. MULDER: Well, had we gone out and hired the doctor ourselves, it might show some partiality.

THE COURT: If it's not mentioned at all, there will be no partiality.

MR. MULDER: I want to go into it. I think it's material and important. I think they ought to know it.

THE COURT: Well, your objection to it was that it would show partiality on your part.

MR. SCOTT: It would be admissible if we had hired him.

MR. MULDER: The Court is to be impartial. Certainly I can see no impartiality on the Court's part.

MR. SCOTT: If we had hired him, they could bring

that out.

MR. SIMMONS: We understand the Court's impartial, and I know that, and Mr. Scott and Mr. [S/F 2784] Mulder knows it, but our concern is that the jury might feel because the Court had appointed this man as a psychiatrist in this case, that they should give more credence or weight to his testimony than they ordinarily would. We think it would be a comment on the weight of the evidence.

THE COURT: There won't be any comment made.

MR. SIMMONS: If he doesn't mention that the Court appointed Dr. Grigson, there wouldn't, which is our Motion in Limine. In other words, if Mr. Mulder is allowed to say, "Judge Scales appointed this doctor to examine the Defendant," well we think that's a comment on the weight of the evidence in that the jury would have a tendency or be inclined to give it more credence or weight than if they felt like either the State had hired him or the Defendant had hired him.

THE COURT: Well, the truth is that I appointed him, and if he is not asked, then the jury will assume the State hired him.

MR. SIMMONS: We certainly don't intend to ask him and what I'm concerned about is Mr. Mulder asking him directly or saying it in his Argument to the jury.

MR. MULDER: I will ask him directly. I [S/F 2785] wouldn't argue something that wasn't in evidence.

MR. SIMMONS: We certainly think our motion would go to that question, too.

THE COURT: I think if nothing is said, the jury is going to think the State hired him.

MR. MULDER: I don't think there is any question about that.

MR. SIMMONS: The State is presenting him as a witness. They're vouching for him, so whether they hired him or not —

MR. SCOTT: He would have been available to them, also.

THE COURT: I appointed him, and he was available to you if you wanted him. Therefore, I am going to

change my ruling and allow the State to show that he was appointed by the Court.

MR. SIMMONS: Note our exception.

- - -

JAMES P. GRIGSON,

called as a witness by the State, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

VOIR DIRE EXAMINATION

BY MR. SIMMONS:

[S/F 2786] Q. Dr. Grigson, when did you go see Ernest Benjamin Smith?

A. February the 18th, 1974.

Q. And this was some month and five or six days before that — before now?

A. Whatever it is.

Q. Whatever it is? Did Judge Scales request you to go see him?

A. Yes, he did.

Q. Did you ever ask Ernest's attorney or get permission from Ernest's attorney to go?

A. No, sir, I did not.

Q. Did Mr. Mulder talk to you with regard to what he had said — with regard to what Ernest had said to you?

A. He asked me about my findings — wanted a copy of the report. We did discuss some of what was in the evaluation in terms of diagnosis.

Q. Did he tell you at that time, or was there any discussion as to whether or not you had ever talked to Ernest's attorney about whether or not you had permission to see him?

A. No. None that I recall.

Q. Was this at the time he told you you would be called to testify here at trial — to testify in [S/F 2787]

this case?

A. No. I don't think anything was said about that.

Q. When did he tell you?

A. He wanted to know what I found.

Q. When did he tell you that you would be called to testify?

A. Let's see. I only knew I was testifying today about — let's see — 1:45. No, must have been about 2:30. I had seen Mr. Mulder last Thursday, and he said that they had selected a jury and that they were putting on the trial and would probably need me to testify some time this week.

Q. All right. Prior to that — back when you talked to Ernest Benjamin Smith up in the jail or even before that. Did Mr. Mulder tell you to talk to him with regard to coming to court and testifying?

A. No, sir, he didn't.

Q. Just said to go see him and —

A. No. He said — let's see. I'm not sure he said this. I think that Mr. Mulder said, "Judge Scales wants you to examine Ernest Benjamin Smith, Jr. He's charged with murder, armed robbery, or three counts of armed robbery," and I think possession of some kind of drugs or something.

Q. When you sent him your report, did you ever [S/F 2788] discuss this report with him?

A. With —

Q. Your report with him? Mulder, I mean.

A. Yes. I told Mr. Mulder what I had found.

Q. Did he tell you at that time that he wanted you to come to court and testify to it?

A. No. I don't recall him saying, you know, "I want you to come and testify." He said, "All right."

Q. Did he ever indicate that you would be called to testify?

A. Yes. Last Thursday, certainly he said that it looked like, you know, they were getting a jury, and he would probably need me to testify this week.

Q. At the time you talked to him prior to the selection of the jury or back when you talked to the Defendant or

before or after that, did he indicate to you that he wanted you to testify in this case?

A. Now wait a minute. I got lost, Mr. Simmons. Will you state that again?

Q. Any time and any occasions you have discussed with Mr. Mulder this Defendant or the facts of this case, has he ever indicated to you that he wanted you to testify in this case?

MR. MULDER: I'm going to object at this time. We can't see where he's going. What's the [S/F 2789] purpose of his Voire Dire Examination?

MR. SIMMONS: We're outside the presence of the jury.

MR. MULDER: I understand that. But let's have him state his purpose.

MR. SIMMONS: If he will answer the question, we will try to tie it in.

THE COURT: To what?

MR. SIMMONS: To what we are getting at.

MR. MULDER: What's he getting at?

THE COURT: Go ahead and answer the question and he can tell us what he's getting at.

THE WITNESS: Yes, sir. He had requested me to testify.

Q. (By Mr. Simmons) All right. In this case?

A. Yes, sir, he did.

MR. SIMMONS: We move that this testimony — this witness not be allowed to testify in the trial of this case, because we have made a motion that the State's witnesses be listed for their case in chief, and that motion was granted and a part of the motion said any witnesses that they planned to use on punishment, if known, were to be listed on their list of State's witnesses. We think it's apparent from what the witness has said that the Assistant District Attorney [S/F 2790] intended to call Dr. Grigson to testify in this case in the punishment hearing, and therefore, they knew that they were going to use him and his name should have been listed on the list. It was not. We object to his testimony.

THE COURT: Overruled.
MR. SIMMONS: Note our exception.
THE COURT: Any further questions?
MR. SIMMONS: No.
THE COURT: Mr. Simmons, is an hour all right?
MR. SIMMONS: All right.
(Whereupon the jury was returned to the courtroom and the following proceedings were had in the presence and hearing of the jury:)
THE COURT: Members of the jury, out of your presence, this witness was sworn to tell the truth, the whole truth and nothing but the truth, so help him God.

JAMES P. GRIGSON,
called as a witness by the State, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

[S/F 2791] BY MR. MULDER:
Q. You are James P. Grigson?
A. Yes, sir, I am.
Q. And what is your business or profession, please, sir?
A. I'm a medical doctor. I specialize in psychiatry. I am in private practice.
Q. Dr. Grigson, what has been your educational and professional background in the field of medicine?
A. I obtained my M.D. Degree from Southwestern Medical School branch of the University of Texas here in Dallas. Served one year of rotating internship at the Baylor Medical Center; spent three years in approved psychiatric residency training programs, eighteen months at Timberlawn and eighteen months at Parkland Hospital here in Dallas; went into full time teaching in the Department of Psychiatry at the medical school where I taught four and a half years. There was some overlapping. I was consultant to the Terrell State Hospi-

tal System for about two years, and then I was consultant to Texas Women's University Health Center for two years. Then I was consultant to the Dallas County Health Department for three years. I have been out in full time private practice now for about six, six and a half years. I continue to teach on a limited basis.
[S/F 2792] My license to practice medicine is on file here in Dallas County. I'm certified by the American Board of Neurology and Psychiatry.

Q. Now, Dr. Grigson, will you tell us what medical organizations you are a member of, please, sir?

A. I'm a member of the Dallas County Medical Society, the Texas Medical Association, the American Medical Association, the North Texas Neuropsychiatric Society, the Texas Psychiatric Association, the American Psychiatric Association, the Dallas Southern Clinical Society. I think that's it.

Q. I believe you stated that you are certified in your specialty of psychiatry by the Board of Neurology and Psychiatry?

A. Yes, sir, I am.

Q. Would you tell us what the Board of Neurology and Psychiatry is and what Board certification means?

Q. Each one of your branches in medicine has a specialty branch such as surgery or thoracic surgery, pediatrics — has a specialty board that sets forth requirements in terms of training, experience, that you have to fullfil in order to specialize in that particular area. In the area of psychiatry and neurology, they have a combined board, the American Board of Neurology and Psychiatry and they require that you graduate from an accredited [S/F 2793] medical school that they accept, and that you do one year internship where you have sort of a general type of medicine internship; then spend three years in an approved psychiatric residency training program. Those three years are designated so much in terms of hospitalized patients; so much in terms of outpatients; so much time in psychiatry; so much time in neurology and they also require that you have a certain number of hours, lectures and seminars in say basic psychiatry,

basic neurology, basic clinical psychiatry and basic clinical neurology. Then, after you complete those required three years, they require that you have two years of practical experience.

After you get that, they consider that you are Board qualified. If you go ahead and send your credentials in and your background in terms of experience and training, then they set up a four hour written examination in basic neurology, basic psychiatry, clinical psychiatry, clinical neurology. You pass all four of those, then they give you a six hour examination — oral examination where you actually examine patients and you have anywhere from a minimum of six examiners on up to possibly a hundred. If you pass all six hours in — again, basic neurology and psychiatry and clinical neurology and psychiatry, they certify you or say that [S/F 2794] you have fulfilled the requirements of this particular Board.

Q. All right. Now, Dr. Grigson, have you examined few or many persons who are charged with criminal offense?

A. It's close to about eight thousand. Somewhere between seven and eight thousand.

Q. Somewhere between seven and eight thousand?

A. Yes, sir.

Q. Dr. Grigson, you have been called here to testify regarding Ernest Benjamin Smith. Do you know him?

A. Yes, sir. I have examined Mr. Smith.

Q. Do you see him here in court?

A. Mr. Smith is there at the Counsel table. Whenever I examined him his hair was more up in pigtails, and he had a goatee, but I recognize the mole he has on his right cheek and has sort of — actually, a birthmark on his left cheek, but it looks more like a burn. But that is Mr. Smith there.

Q. Now, at whose request did you examine Ernest Benjamin Smith?

A. Judge R. T. Scales of this Court.

Q. When did you first examine the Defendant Smith? [S/F 2795] A. This was on the 18th of February of this

year.

Q. And where did the examination take place?

A. This was on the Eighth Floor of the Dallas County Jail. It was in the Hospital Division. There's a small room that has a table, two chairs where I examined him.

Q. And what type of an examination did you give Smith?

A. I gave the complete psychiatric evaluation. It's called a mental status examination.

Q. Will you explain to the jury just how that examination was conducted?

A. The mental status examination is equivalent to the physical examination. Most of you are more familiar with a physical examination. Whereas it's divided up into head, ears, eyes, nose, throat, heart, lungs, chest, abdomen, the mental status examination was developed in order to examine an individual primarily in three areas — thinking, feeling and behavior. Now, if a person has a brain tumor, hardening of the arteries, thyroid disease or some type of physical illness that affects thinking, feeling or behavior, it does show up in this type of exam. I divide it into five different parts.

The first is called general appearance and [S/F 2796] behavior. This is the way a person walks into the interview room, the way they sit, attention or lack of attention to personal appearance. If you take the two primary symptoms that one encounters in psychiatry, it's depression and attention and an individual that is highly tense walks a little bit faster, more jerky. There's more body movement while sitting. At the other extreme, a highly depressed person will not pick their feet up off the floor as high. There's more of a shuffling type of gait or walk. The shoulders are usually slumped forward, maybe stooped somewhat, and of course either of these extremes affects the individual's attention or lack of attention to personal appearance.

The second part of the examination is called a production of thought. This is really the more difficult part of the examination to teach or understand. Ordinarily, whenever you're listening to an individual, you're listen-

ing to what is called thought content. It has to do with the meaning the individual is trying to communicate to you. But, this part that is called production of thought has to do with the way in which your thoughts come out and how they are related one to another. You consider it normal if your thoughts come out just a logical, rational sequence meaning that they simply make sense. An individual that [S/F 2797] has schizophrenia, their thoughts come out a certain way. As we all get older, we tend to ramble. It takes us longer to make our point. This is called circumstantial thinking.

The third part of the examination is called affect or mood. This is simply a reflection of the individual's emotional state, their feeling state. If a person is talking about something sad, then you expect to see sad facial expressions — their tone of voice, gestures. On the other hand, if they're speaking of something pleasant, you expect to hear this in the tone of voice and see it in their face and body movements so to speak.

The fourth part of the examination is called content of thought. It is during this part of the examination that you get historical information. Birth, early development, educational history, occupational history or service history, marital history, family history, and of particular importance in an individual charged with a crime is their ability to discuss with you those charges or what they were doing on or around or about the time that the alleged offense took place, assuming that if they are able to give you this information, then they are going to be able to go ahead and help their attorney in terms of preparing a defense. Also of importance [S/F 2798] is the presence or absence of delusions or hallucinations — some type of misinterpretation of reality. Hallucinations is where an individual say will see something that is not there or they will hear something that is not there. That is called an auditory hallucination or have an olfactory hallucination where they smell something that is not there.

The fifth part is called the sensorium. This is what most lay people think of as the psychiatric or psycho-

logical examination and yet it makes up a small part of the total exam. It has to do with is the individual oriented to time, place and person. All that means is: Do they know who they are, where they are and what's going on about them. It has to do with recent and remote memory, their intellectual functioning, attention span and concentration ability. But, it is really with these five different parts put together that you should be able to determine how an individual is functioning from an emotional and mental standpoint.

Q. Will you explain to the jury what your findings were with result to Smith?

A. Yes, sir. Mr. Smith was a — is a 26 year old colored male at the time I examined him. His hair is up in pigtails over his head. He does have a mole on his right cheek and sort of a slight discoloration [S/F 2799] on his left side of his face. He has a tattoo on his left — small tattoo, I think, on his left hand. His behavior was completely normal. I saw nothing abnormal or unusual in the way in which he walked, and his body movements while sitting. He had given attention to his personal appearance. I found nothing abnormal or unusual there.

With regard to his production of thought, his thoughts came out in a rational, logical sequence. It was perfectly normal. I could find nothing unusual or abnormal there.

With regard to his emotional state, for the most part throughout the examination he was very pleasant, very co-operative, very polite. The one significant fact which was present was I could find absolutely no signs of any remorse or any type of guilt feelings. I thought this was very important in the situation that existed.

Again, I could find no remorse feelings, no guilt feelings.

With regard to his content of thought, he was able to give me historical information with regard to birth, educational history, service history, occupational history, marital, family — he was able to discuss with me the charges against him. I could find [S/F 2800] absolutely no evidence of any types of delusions or hallucinations.

With regard to his sensorium, he was oriented. He knew who he was, where he was. He knew what was going on around him. His recent and remote memory were intact. They were very good. He's certainly at least average intelligence. His attention span and concentration ability were okay.

Q. Dr. Grigson, does Smith have any mental or thinking disorder?

A. No, sir, he doesn't.

Q. May we assume, then, that at least in your opinion he is neither medically or legally insane?

A. Well, he is certainly not medically insane and from the legal questions, he is aware of the difference between right and wrong, and he certainly is capable of aiding his attorney in his defense.

Q. All right. Now, Dr. Grigson, I believe you stated that Smith's memory was intact as regards past events?

A. Yes, sir, it is.

Q. And was he able to discuss with you the circumstances that led to his present difficulties?

A. Yes, he certainly was.

Q. All right. Now, Dr. Grigson, what is your [S/F 2801] diagnosis of Ernest Benjamin Smith?

A. Mr. Smith has what is called a sociopathic personality disorder.

Q. And what is that, please, sir?

A. This is really just a descriptive term that describes certain personality traits or characteristics. It is not an illness or a sickness. It's simply a descriptive term that does describe an individual that has certain characteristics.

Q. What is a sociopath?

A. Primarily they are individuals that do not have a conscience that most of us develop at an early age. They have no type — say guilt feelings, remorse feelings. When they, say, do wrong, they are very much aware of the difference between right and wrong, but it may be breaking mother's rules, or it may be breaking church rules or legal rules. There are varying degrees of this. But also they have a tendency to be able to manipulate

people. Since they don't operate on the same type value system with regard to, say, a conscience, they are able to very freely manipulate people without, say, considering, "Well, I really shouldn't do that." It's I can do that and get away with it." They derive a certain amount of satisfaction —

Q. Are they truth tellers?

[S/F 2802] A. Oh, no sir. Only if it serves their purpose. They will tell the truth if it serves their purpose. If it's harmful, whatever distortion of the truth is necessary is what they they will use.

Q. Dr. Grigson, are all sociopaths the same or are there degrees of perhaps a scale of sociopathy?

A. It's like high blood pressure. You can have a little bit of high blood pressure or have serious high blood pressure, and the same is true with an individual that is a sociopath. You can have a very mild degree or you can have a very marked severe degree.

Q. Would you tell us where Ernest Benjamin Smith would fit on that scale?

A. Well, he would have to be way down to the very severe end — at the very end.

Q. You're saying he is a very severe sociopath?

A. Yes, sir, I am.

Q. No conscience, no remorse, no guilt feelings?

A. No. He has none.

Q. Now, Dr. Grigson, what is your prognosis in this case?

A. Oh, he will continue his previous behavior — that which he has done in the past. He will again do it in the future.

Q. All right. So, were he released into society, [S/F 2803] I take it, then, you would not expect his behavior to differ from what it has been?

A. No. If anything it would only get worse.

Q. Now, Dr. Grigson, this sociopathic personality that Smith has — is this a condition that will improve with time? I guess — what I'm asking you is this: Is this a stage that he is passing through that he will grow out of?

A. No. This is not what you would consider a stage. This is a way of life. Just as you work every day, well his personality comes out in his behavior, but it is not a stage he is going through. It's only something he will continue.

Q. You said get worse?

A. Yes.

Q. If it can?

A. Right.

Q. Dr. Grigson, I will ask you if Ernest Benjamin Smith has any regard for the lives and property of other persons, be they inmates, guards, visitors or just citizens?

MR. WILSON: We object to the form of the question. He can ask for the man's opinion.

Q. (By Mr. Mulder) Do you have an opinion as to whether or not he has any regard for the lives of [S/F 2804] property, of other persons, be they prisoners, guards, visitors or just citizens?

A. Yes, sir, I have an opinion as to that.

Q. And what is that opinion?

A. Well, it's my opinion that really, Mr. Smith does not have any regard for another human being's property or for their life, regardless of who it may be. This is what makes him such a very severe sociopath. He has complete disregard for another human being's life.

Q. Dr. Grigson, does the field of medicine — perhaps psychiatric treatment and/or hospitalization of some sort — does that have anything beneficial to offer someone like Ernest Benjamin Smith?

A. We don't have anything in medicine or psychiatry that in any way at all modifies or changes this behavior. We don't have it. There is no treatment, no medicine. Nothing that's going to change this behavior.

Q. Now, Dr. Grigson, do you have an opinion as to whether or not there is a probability that the Defendant, Ernest Benjamin Smith, will commit criminal acts of violence that will constitute a continuing threat to society?

A. Yes, sir. I have an opinion as to that.

Q. And what is that opinion?

A. That certainly Mr. Smith is going to go [S/F 2805] ahead and commit other similar or same criminal acts if given the opportunity to do so.

Q. Now, Dr. Grigson, I believe you have stated that this man has no remorse or sorrow for what he has done?

A. No. He has none.

Q. Now, let me ask you one last thing. Does this man — can you tell from your examination whether he has — I guess a dominant personality or a leader type individual or is he a follower?

A. No. He is very much a leader. Due to his intelligence and his manipulating ability, he is very much a leader.

Q. He is not the type to just go along with somebody else just because it seems like the thing to do?

A. Certainly not. He would lead his way and go his way. He is not what you would consider a follower.

MR. MULDER: We will pass the witness for Cross Examination.

CROSS EXAMINATION

BY MR. SIMMONS:

Q. Dr. Grigson, you're kind of the hatchet man down here for the District Attorney's Office, aren't you?

MR. MULDER: We object to that.

THE COURT: Sustained.

[S/F 2806] Q. (By Mr. Simmons) Isn't it a fact that when they want to try to send somebody to the electric chair or give them severe punishment, they bring you in to testify about the Defendant?

A. They use requests that I receive on cases such as this or where they want to send somebody to Rusk State Hospital — used in all sorts of cases. Yes, sir.

Q. How many times would you say that you have been down here to the Dallas County Courthouse and testified in a criminal case?

A. Oh, I don't know. I would say — I don't have any — several hundred times, I'm sure.

Q. During that seven hundred times —

A. Several hundred.

Q. Several hundred. I thought that was what you said. During the several hundred times that you have been down here to testify, have you always testified for the District Attorney's Office?

A. No, sir, I have not.

Q. On how many occasions do you think that you have ever testified for anybody other than the District Attorney's Office?

A. Well, I never testify for anybody. I only testify as to what my findings are. Usually, if the [S/F 2807] Defense Attorney likes what I have found, they call me. If the District Attorney's Office — well, usually they call me whether they like it or dislike it. I never testify for anybody.

Q. Did you ever furnish the Defense Attorneys in this case a copy of your findings?

A. I was told that they were certainly going to be made available to you — that you would be given those. That was my misunderstanding.

Q. Do you know what causes a person to be a sociopath?

A. No, sir. We have no idea. There's been a lot of research done and a lot of money spent, but we still don't know what causes it.

Q. How long a time did you spend with Ernest Benjamin Smith?

A. Oh, I would say — somewhere an hour and a half or thereabouts. I don't exactly recall.

Q. Approximately an hour and a half?

A. Yes, sir.

Q. And you say that after talking to him for an hour and a half, you are convinced that he is a severe sociopath on the far end of the sociopathic scale?

A. Yes, sir. Absolutely.

Q. What would you say was the most important [S/F 2808] thing that he said or did or the most important response that you got that caused you to think that he is a severe sociopath down on the far end of the sociopathic scale?

A. He told me that this man named Moon looked as though he was going to reach for a gun, and he pointed his gun toward Mr. Moon's head, pulled the trigger, and it clicked — misfired, at which time he hollered at Howie, apparently his other partner there who had a gun, "Watch out, Howie. He's got a gun." Or something of that sort. At which point he told me — now, I don't know who shot this man, but he told me that Howie shot him, but then he walked around over this man who had been shot — didn't look to see if he had a pistol in his belt or in his coat.

Q. Let me interrupt you.

MR. MULDER: No. No.

THE COURT: Finish your answer.

THE WITNESS: Didn't check to see if he had a gun nor did he check to see if the man was alive or dead. Didn't call an ambulance, but simply found the gun further up underneath the counter and took the gun and the money. This is a very — sort of cold-blooded disregard for another human being's life. I think that his telling me this story and not saying, you know, "Man, I would do [S/F 2809] anything to have that man back alive. I wish I hadn't just stepped over the body." Or you know, "I wish I had checked to see if he was all right" would indicate a concern, guilt or remorse. But I didn't get any of this.

Q. (By Mr. Simmons) All right. You're saying, then, that because he didn't show any remorse to you, because of Mr. Moon's death, that's what led you to believe he was a severe sociopath?

A. No. This was just part of it in terms of the attitude. I mean, again, it was not just this. But, some of his other behavior, but certainly this thing stood out so clearly.

Q. Would you say, being a psychiatrist, that a person could have been frightened or in a daze or state of shock, and that would have caused him to act in such a way as Ernest Benjamin Smith did?

A. Well, certainly. Yeah. I think if I had shot somebody I would certainly be in a daze or state of shock.

But, you know, I think that if I were in that sort of situation I would probably be frightened and run like the devil. I wouldn't step over the body to get the money. I would want to get out of there. But an individual that is involved in, say, a goal directed fashion certainly is not functioning in a daze or shock [S/F 2810] type state.

Q. Are you saying, Doctor, that he was pleasant with you during your interview?

A. Yes. He certainly was. He was very pleasant.

Q. Was he co-operative?

A. Very co-operative.

Q. Was he polite?

A. He was extremely polite.

Q. Are you saying that a person who is truthful — that would not be a symptom of being a sociopath?

A. You see, I don't know how truthful he was with me, sir. I don't know who shot this man and from a medical standpoint in terms of any examination, it's not so important. I think that he certainly was truthful at times. As to exactly when, I don't know.

Q. Was there any discussion of having pulled the trigger as a reflex action — as the gun was jerked in another direction?

A. No. He told me that he jerked it toward Moon's head as a reflex action — that he thought the man was going for the gun or for a gun and pulled it. Again, I don't know that this is the truth or not.

Q. Right. I understand that you're just going by what he told you.

A. Yes, sir.

[S/F 2811] Q. Did he ever tell you that he had a pistol with him that he knew would not fire?

A. No, sir. He told me that he didn't have a shell in the chamber, which was the reason that it misfired. Again, I don't know that is true.

Q. Did he tell you that that particular gun would not put a shell in the chamber?

A. No, he didn't.

Q. He didn't tell you that?

A. No, sir.

Q. You spent an hour and a half with Ernest Benjamin Smith?

A. Yes, sir.

Q. When do you think that a person begins to manifest any signs of sociopathic personality?

A. It varies. Some begin to show some of the early symptoms say 4 or 5 years old. Others, it may not show up until they are 30. It does vary considerably.

Q. Isn't it the usual case, Doctor, that if a person is a sociopath and more especially a severe sociopath at the end of the scale as you have described to Mr. Mulder about Ernest Smith — isn't it a fact that it is more likely than not that this kind of conduct and traits will come out in him at an early [S/F 2812] age?

A. Usually you see it in their — say their early teenage years.

Q. If a person were a sociopath, wouldn't it be unusual for him to manifest that characteristic at age 26 if he had not manifested it earlier than that?

A. No. This is — many times these individuals — again, the more intelligent they are, the more they usually are not so obvious. They don't get caught. What I'm trying to say is that usually they are manifesting it, but if they're really smart, again, they don't get caught. Again, sometimes you don't really see the overt manifestations until they are 30 years of age. Usually it is earlier, though.

Q. Would you say that a person that had been considered to have been a dependable during his lifetime or teenagehood or young adulthood — that would indicate that he is not a sociopath?

A. No. You find many sociopaths that are dependable as long as they are getting what they want. In other words, as long as they are, you know, getting their needs met, then they certainly, you know —

Q. In other words, you're saying somebody that is fooling people —

[S/F 2813] A. No, sir. I didn't mean to say that. They are capable of fooling people, but I just meant that as long as they're being taken care of, then — you know,

you may not see overt behavior. Usually you do.

Q. If you had a man that was considered to be a truthful person throughout his lifetime, would you way that person is a sociopath?

A. Well, not just that one characteristic certainly wouldn't make him a sociopath.

Q. Would the reverse be true — a person who is a truthful person, has a reputation as being a truthful person would not be a sociopath regardless of his other characteristics?

A. No. That is not necessarily true, because again you may not know a sociopath is not a truthful person. But if — you know, if a person is absolutely truthful, then you know — you don't suspect him to be a sociopath.

Q. Have you ever, during your experience of talking to people charged with crimes as you have described to this jury — have you ever met and talked to as nice a young man as the man at the end of the Counsel table?

A. Yes, sir, I have. Several occasions. Bobby Joe Daniels was very pleasant and co-operative [S/F 2814] under similar type circumstances.

Q. All right. Are you saying, then, that he is more pleasant and a nicer person than most of them?

A. No, sir, I'm not saying that. I'm just saying that he is a pleasant or was, certainly — during — throughout the examination that I did. He was very pleasant.

Q. And co-operative with you?

A. Co-operative.

Q. He didn't try to lead you to believe that he was insane or crazy or anything like that, did he?

A. No. He certainly didn't do anything like that.

Q. Did he talk to you in an intelligent, rational manner?

A. He certainly did.

Q. You have earlier said that he was polite, co-operative, pleasant.

A. Right. He certainly was.

Q. Have you ever talked to Ernest Benjamin Smith's stepmother?

A. No, sir, I haven't.

Q. Have you ever talked to any of his relatives about him?

[S/F 2815] A. No, sir, I haven't.

Q. Have you ever talked to any of his friends about him?

A. I did examine Mr. Robinson.

Q. You're talking about the other man involved in this situation?

A. Yes, sir.

Q. Did you ever do any other investigation with regard to Ernest Benjamin Smith other than talk to him for an hour and a half?

A. No. That was primarily — it was primarily based on that examination — what I found.

Q. Based on your discussion with him?

A. Yes.

Q. For an hour and a half, at which time he was pleasant, co-operative, polite and so forth — the other things you have discussed here?

A. Yes, sir.

Q. Or described?

A. Uh-huh.

Q. He talked to you intelligently. He was rational. He didn't try to fool you into thinking he was crazy or anything, did he?

A. No. I think he was trying to fool me, but not into thinking he was crazy.

[S/F 2816] Q. Fool you in the manner that you have already described to the jury, is that correct?

A. Well, with regard to who shot who or what happened.

Q. Are you saying that you don't believe what he said about who shot who?

A. No. I'm saying that I don't know. I don't know.

Q. Never talked to anybody about him other than —

A. No, sir.

Q. Anybody that knew him or was acquainted with him before this trouble or anything?

A. Just — again, to Howie Ray Robinson.

Q. You say his behavior was normal?

A. Yes, sir, it was.

Q. Nothing abnormal about his behavior?

A. No.

Q. Intelligent talking

A. Right. Certainly was.

Q. Polite?

A. Yes, sir.

Q. Courteous?

A. Yes, sir.

Q. Pleasant?

[S/F 2817] A. Yes,sir.

Q. You talked to him for an hour and a half. Never talked to anybody else about him — no relative, anybody else?

A. Yes, sir. I talked to Mr. Robinson.

Q. You're talking about the friend or the other person?

A. Yes, sir.

Q. And you say now that he is a severe sociopath down at the end of the sociopathic level?

A. Yes, sir, I do.

Q. And the reason you do that is that you feel he should have shown remorse about Mr. Moon?

A. Oh, absolutely. Certainly, sir. Should have had some guilt-type feelings — remorse.

Q. Would it make any difference in your evaluation of Ernest Benjamin Smith if you thought or believed that he felt that he was not responsible for Mr. Moon's death? Would that make any difference with regard to his remorse?

A. But, you know, he was. He at least stated he picked out the store. You know, he chose it. He was in there, so he was responsible. So, I feel like that — you know, certainly he should feel remorse.

Q. You feel that because he was there that he [S/F 2818] would be responsible for it, and he should feel remorse?

A. Well, yes, sir. I think any normal person with a conscience would feel, you know, concern or you know, say, "Golly, you know, I didn't mean to kill the man."

Or — you know, would be concerned.

Q. If he didn't kill the man, he wouldn't have any statement to make like "I didn't mean to kill the man," would he?

A. No, but he would say, "Gosh, I wish that wouldn't have happened while we were doing this. All we wanted to do was rob the store." But, I didn't hear anything like that.

Q. But you did hear a young man that was pleasant, co-operative, polite and these other things?

A. Yes, sir, I did.

MR. SIMMONS: That's all the questions we have.

REDIRECT EXAMINATION

BY MR. MULDER:

Q. Dr. Grigson, he told you that he — when he saw Mr. Moon make a move that he hadn't told him to make, that he came up with his gun and tried to shoot him?

A. Yes.

Q. And his gun misfired, because he failed to put a bullet in the chamber?

[S/F 2819] A. He didn't tell me he failed to put a bullet in the chamber. He told me he pointed the gun at Mr. Moon, tried to fire, and that it misfired. He said there wasn't a bullet or shell in the chamber.

Q. All right. Now, Dr. Grigson, over the years you have testified many times, have you not?

A. Well, on occasion, yes, sir.

Q. You have been called to testify by both Judges, Prosecutors and Defense Lawyers, have you not?

A. Yes, sir, I have.

Q. Testified in State and Federal Court — Dallas County, all over the State, as far as that is concerned?

A. Yes, sir, I have.

Q. As a matter of fact, you have testified for Howard Wilson, have you not?

A. Yes, sir. I never testify for anybody, Mr. Mulder.

Q. You have been called by him?

A. Yes, sir. I'm sure I have. I don't specifically recall, but I'm sure I have.

MR. MULDER: I believe that's all we have.

RECROSS EXAMINATION

BY MR. SIMMONS:

[S/F 2820] Q. Did you ever meet a person you didn't think was a sociopath?

A. Yes, sir.

Q. You won't have to name him. That's all right.

MR. MULDER: No. Go ahead.

THE COURT: Had you finished your answer?

THE WITNESS: No, sir, I hadn't, Your Honor. No. Only a relatively small per cent of the individuals that I examine charged with a crime are sociopaths. About fifteen per cent of them are suffering from emotional illness. About maybe fifteen per cent of them are faking. But it's not a large number of them that are actually sociopaths, but a certain per cent.

Q. (By Mr. Simmons) Am I correct in saying, from what you have told Mr. Mulder and told the jury, that one of the keys, so far as you are concerned, is the situation of remorse?

A. No. It's the lack of guilt and their ability to manipulate. There are other factors, but these two are outstanding.

MR. SIMMONS: That's all we have.

MR. MULDER: That's all we have.

THE COURT: Thank you.

[S/F 2821] Your next witness, please.

MR. MULDER: Your Honor, and ladies and gentlemen of the jury, the State will rest on the issue of punishment.

MR. SIMMONS: We will rest on punishment.

MR. MULDER: We close.

MR. SIMMONS: Close.

THE COURT: Close the testimony. Excuse the witnesses.

(Whereupon the Charge of the Court on the issue of punishment was read to the jury, after which the following proceedings were had in the presence and hearing of the jury:)

* * *

End of Statement of Facts

COURT OF CRIMINAL APPEALS OF TEXAS

Ernest Benjamin SMITH, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 49809.

Feb. 18, 1976.

On Appellant's Motion for Rehearing
July 14, 1976.

Defendant was convicted before the 195th Judicial District Court, Dallas County, R. T. Scales, J., of murder, committed during course of robbery, and he appealed. The Court of Criminal Appeals, Morrison, J., held, inter alia, that defendant could be convicted of murder despite fact that it was defendant's codefendant who killed deceased, that evidence supported finding that defendant would always constitute continuing threat to society, that indictment was not fatally defective, that death penalty statute was not unconstitutional, that oath required of jurors in capital case was not unrealistic repressive oath and did not limit inquiry into their qualifications, that proof of possession of pistol by defendant prior to robbery might be justified as in rebuttal to testimony that defendant did not own pistol, but testimony as to subsequent possession should not have been admitted, that such error did not constitute reversible error however, and that trial court did not err in submitting murder with malice in charge to jury at guilt-innocence phase of trial.

Affirmed.

John F. Simmons, Dallas, for appellant.

Henry Wade, Dist. Atty., James B. Scott, Douglas D. Mulder, Stephen P. Tokoly and Winfield W. Scott, Asst. Dist. Attys., Dallas, Jim D. Vollers, State's Atty., and David S. McAngus, Asst. State's Atty., Austin, for the State.

OPINION

MORRISON, Judge.

The offense is murder; the punishment, under Article 1257, V.A.P.C. and Article 37.071, V.A.C.C.P., death.[1]

The record reflects that grocery store operator William Moon was killed during the commission of a robbery at his market.

By ground of error one appellant contends that the evidence is insufficient to support the conviction, since it was the appellant's co-defendant who killed the deceased during the robbery. Such a contention completely ignores the law of principals, and is without merit. *Thompson v. State*, Tex.Cr.App., 514 S.W.2d 275; *Leviness v. State*, 157 Tex.Cr.R. 160, 247 S.W.2d 115.

Appellant's next contention relates to the punishment hearing. Appellant claims that the evidence is insufficient to support the jury's answer of "yes" to Special Issue No. 2[2] of Article 37.071, supra.

This appellant testified that he had been unable to obtain a regular job since his conviction for possession of marihuana in 1970, and that he was unemployed on the night of the homicide when he met George Holden and Howie Ray Robinson at the Pussy Cat Lounge. He stated that Holden asked if he wanted to make some money and that from his prior knowledge of Holden that he was not a "working individual",he knew that whatever Holden proposed would not be legal. Appellant testified that after he agreed to go with them he went to his home, changed clothes and got a pistol. He also stated he knew Holden had a pistol, which he gave to Robinson. They then went to the grocery store, where appellant

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[1] This offense was alleged to have been committed on 29th day of September 1973. This was during that period of time when Article 1257 was in operation and before Sec. 19.03 became effective.

[2] Article 37.071(b)(2) states:

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

and Robinson entered and Holden remained in the automobile. When appellant and Robinson found customers in the store; they left and did not re-enter until after the customers had left. At this point, appellant pointed the pistol at the attendant and told him, "This is a hold-up." When the attendant made a motion "behind his jacket", appellant called to Robinson, who shot and killed the attendant. We pause here to observe that it was this appellant who first pointed his weapon at deceased and attempted to shoot him. It was only after the appellant's gun misfired that he called to his co-principal to complete the killing which he had attempted.[3] Following this, all the money, including the change, and a pistol kept by the attendant were taken, and the parties repaired to the house of a friend, where the fruits of the robbery were divided and the parties separated. Appellant spent the night in a house nearby.

Appellant's oral confession was also admitted into evidence.

Dr. James P. Grigson, a practicing psychiatrist appointed by the court to examine appellant, testified that his examination had led him to conclude that the appellant, though medically and legally sane, felt no remorse or sense of guilt as the result of his participation in this robbery-murder. Grigson also expressed the opinion that appellant's conduct in the future would not change. He further stated that his branch of medical science had found no cure for persons who were suffering from the type of personality disorder demonstrated by appellant.

Though not a serious one, this appellant had a criminal record. Of extreme importance is his apparent surrender to misfortune following his marihuana conviction. He made no effort to rehabilitate himself, and no serious effort to secure steady employment. There was no evidence that appellant was in any way under the

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[3] At the trial, appellant testified he shouted, "Look out, Howie", as the deceased made the motion. However, in appellant's oral confession, which was admitted into evidence, appellant stated that he said, "Get him", to Robinson after his own gun misfired.

domination of anyone, nor was he under any mental or emotional pressure. He simply went out to rob and was the first person who tried to kill his victim (according to his oral confession). After the killing, he testified, he paused long enough to secure a pistol from under the counter and when a cigar box containing coins spilled, he paused to recoup the coins. His entire conduct was calculated and remorseless, and the jury was justified in finding that this appellant will always constitute a continuing threat to society.[4]

Appellant's third ground of error also relates to the punishment hearing. Appellant first charges that the court erred in failing to submit his requested charges five and seven, which were intended as substitutes for Special Issues one and three of Article 37.071(b), supra, and second he claims that the evidence is insufficient to support the jury's finding of "yes" to Special Issues Nos. 1 and 3. This is clearly a multifarious ground of error and presents nothing for review.

However, we will briefly discuss the contention. In substance, appellant contends, without citation of authority, that Special Issues 1 and 3 are not applicable to one charged as a principal.[5] To agree with such contention would require that we ignore this Court's interpretation of the law of principals. Earlier in the opinion

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[4] Appellant has attached to his brief what he denominates as a "Supplemental Transcript". This "transcript" contains the testimony of one of the State's witnesses at another and later trial, which appellant claims is materially different from that testimony given at his trial. The "transcript" is not properly a part of this record on appeal and cannot be considered by this Court. *Booth v. State*, Tex.Cr.App., 499 S.W.2d 129.

[5] Article 37.071(b)(1) and (3), supra, state:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

we declined to do so. Further, regarding the sufficiency of the evidence, the facts set forth under ground of error two are sufficient to support the jury's affirmative responses to Special Issues Nos. 1 and 3.

By ground of error four, appellant claims that the indictment is fatally defective because it fails to set out the elements of robbery in his indictment charging him with murder during the commission or attempted commission of robbery. Appellant contends that the indictment should allege the elements of robbery as well as murder.

Appellant's contention was answered adversely to him in *Jones v. State*, 53 Tex.Cr.R. 131, 110 S.W. 741, and *Oates v. State*, 48 Tex.Cr.R. 131, 86 S.W. 769, which hold that an indictment need not allege the constituent elements of a felony which the defendant was committing or attempting to commit at the time of the homicide charged in the indictment. See also *Gonzales v. State*, Tex.Cr.App., 517 S.W.2d 785; *Watts v. State*, Tex.Cr.App., 516 S.W.2d 414; *Earl v. State*, Tex.Cr.App., 514 S.W.2d 273, which hold that under the new code an indictment charging one offense during the commission of another crime need not allege the elements of the latter offense.

In grounds of error five and six, appellant attacks the constitutionality of Article 1257, supra, Sec. 19.03, V.T.C.A., Penal Code, and Article 37.071, supra. His contentions have been answered adversely to him in our recent opinion in *Jurek v. State*, Tex.Cr.App., 522 S.W.2d 934.

Appellant also contends that the caption of the death penalty statute under which he was tried, Article 1257, supra, fails to meet the requirements of Article III, Sec. 35, of the Texas Constitution in that it "embraces more than one subject, and is therefore insufficient to apprise the Legislature and the public of the full effect of the amendment."

Appellant's brief contains no citation of authority, and no discussion of his contention. Without further elaboration from him, we are unable to meet appellant's

contention other than to observe that the caption covers the one subject legislated upon by the Act.

Appellant's seventh and ninth grounds of error will be discussed together. In the seventh ground of error appellant asserts that Article 1257(d), V.A.C.P., imposes "an unrealistic, repressive oath on prospective jurors and limits inquiry into their qualifications" required by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. As we construe this statute it neither imposes a repressive oath on prospective jurors nor prohibits the inquiry which appellant claims he was denied. However, the appellant does not call to our attention any portion of the record where he was denied an opportunity to make such inquiry.

Appellant seems to be laboring under the impression that Article 1257(d), supra, in itself constitutes an oath to be administered in its own terms to each venireperson. Our interpretation of this statute is that it merely provides one criteria by which each venireperson is to be qualified. This is in agreement with that portion of *Witherspoon* set forth at 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776, footnote 21.[6]

In his ninth ground of error appellant says that the trial court "erroneously allowed the exclusion for cause of veniremen who had scruples concerning capital punishment." Upon rebriefing on orders of this Court, appellant now points out certain named members of the venire who he claims were inadequately examined and

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[6] "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the *sentence*, in this or any other case."

excused because of their views as to the death penalty. We have now examined the voir dire to which appellant points and find that they were tested in accordance with the terms of Article 1257(d), supra, and were additionally questioned so as to substantially comply with the mandate of footnote 21 of *Witherspoon*.[7] This venire qualification can be distinguished from *Hovila v. State*, Tex.Cr.App., 532 S.W.2d 292 (Decided April 30, 1975), where the voir dire complied neither with *Witherspoon* nor with the mandate of Article 1257(d), supra. The questions propounded by the court to each jury panel were leveled solely as to the answers to the issues set forth in Article 37.071(d), supra, and not to the ability of the venirepersons to pass upon the guilt or innocence of the accused or "any issue of fact."

Ground of error eight charges the State used its peremptory challenges to strike four members of the venire who were black, thereby excluding members from the jury who were the same race as appellant.

Appellant's contention was answered adversely to him in *Hill v. State*, Tex.Cr.App., 487 S.W.2d 64, in which we adhered, as we do here, to our earlier holding in *Ridley v. State*, Tex.Cr.App., 475 S.W.2d 769, wherein we stated:

"We hold that no systematic exclusion has been shown. To hold otherwise would in effect be abolishing our peremptory challenge practice which has always been a part of our system to help an accused as well as

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[7] With the exception of venirepersons Baker and Switch, all those mentioned in appellant's brief were tested, as we construe their examination, in accordance with the terms of Article 1257(d), supra.

Baker, a "gospel minister," in the course of his examination, stated:

"Q. Are you saying your religion would prevent you from personally being on a death penalty case?

A. Yeah."

Switch, an employee of a hospital, answered, "Death is something that I would not be able to condemn anybody to." He stated that this was because of his profession.

the State obtain an impartial jury and a fair trial."

See also *Brown v. State*, Tex.Cr.App., 476 S.W.2d 699; *Hardin v. State*, 475 S.W.2d 255. Cf. *Jaquez v. State*, Tex.Cr.App., 473 S.W.2d 530. See also *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.

Grounds 10 and 11 relate to the admission at the guilt-innocence stage of the trial of evidence of extraneous offenses both prior and subsequent to the date charged in the indictment. Both consisted of proof that appellant possessed a pistol in a public place and nothing more. Proof of the possession of a pistol by appellant prior to the robbery might be justified as in rebuttal to his testimony that he "didn't own a pistol", but the testimony as to the subsequent possession should not have been admitted.

It is this continued persistence in making borderline error that causes certain counties in this State to have a much worse reversible error record than others. But regardless of this, we must determine if this proof, in the light of the case as a whole, constitutes reversible error.

The proof is clear, and appellant fully admits in his testimony that he went armed into a convenience store with his companion, who was also armed, and that in the course of the ensuing robbery, the store attendant was shot and killed.

We conclude as we did in *Mabry v. State*, Tex.Cr.App., 492 S.W.2d 951, that the evidence of appellant's possession of a pistol without more was not of sufficient gravity to have influenced a jury who had heard the testimony of this brutal robbery-murder. See also *McNeal v. State*, Tex.Cr.App., 499 S.W.2d 173, and 13B Tex.Dig., Criminal Law § 1169(11).

Appellant next contends that the trial court erred in submitting murder with malice in his charge to the jury at the guilt-innocence phase of the trial. Citing *Brazile v. State*, Tex.Cr.App., 497 S.W.2d 302, appellant claims the type of murder, whether during the commission of a robbery or with malice, relates only to the question of punishment, and was therefore erroneously submitted to the jury at the trial on the merits. No error is shown. *Lee*

v. State, Tex.Cr.App., 503 S.W.2d 244; *Caraway v. State*, Tex.Cr.App., 489 S.W.2d 106.

In a capital case, it was incumbent upon the court to submit the issue of murder with malice in his charge on the guilt-innocence phase of the trial in order to avoid a trifurcated trial. Any other submission would have required a finding of guilt as to murder at the guilt-innocence stage of the trial, a finding of guilt of murder with malice at a second stage of the trial, and a finding that the offense was committed under the circumstances outlined in Article 37.071, supra, at a third stage of the trial. This was not contemplated by the Legislature.

Appellant's last ground of error relates to seven separate instances in which the trial court overruled appellant's motion for mistrial following certain questions and remarks made during the trial. Appellant contends that the net cumulative effect of these incidences, viewed in light of the severity of the punishment, requires reversal.

The seven incidences were:

1. It is appellant's contention, if we understand the same, that the witness Mitchell was guilty of perjury. We are not told exactly where the alleged perjury occurred, in what respect such testimony was false, or how it was called to the trial court's attention. We are at a loss to answer this assertion. This contention does not meet the requirements of Article 40.09, Sec. 9, V.A.C.C.P., and presents nothing for review. *Hurd v. State*, Tex.Cr.App., 513 S.W.2d 936; *Peterson v. State*, Tex.Cr.App., 508 S.W.2d 844.

2. Appellant asserts that the court erred in permitting Dr. Grigson, a psychiatrist, to testify when his name had not been listed in compliance with appellant's motion in limine to list all of the State's witnesses *to be used in its case in chief.* We have concluded that since Dr. Grigson was called in rebuttal, he did not come within the purview of appellant's motion. Since Dr. Grigson had examined appellant prior to trial, his appearance as a witness in rebuttal did not surprise appellant.

3. The appellant further asserts that the prosecution violated the court's order on his motion in limine referring to the appellant as "Dirty Red." The record reflects at the point indicated by the appellant's brief that the witness' answer which contained the name was unresponsive and upon objection the same was sustained and the court on its own motion instructed the jury to disregard the answer. A prompt instruction to disregard is usually sufficient to cure error. No reversible error is reflected. *Pearson v. State*, Tex.Cr.App., 500 S.W.2d 829; *Terry v. State*, Tex.Cr.App., 481 S.W.2d 870.

4. Appellant asserts that the prosecutor referred to an extraneous offense when he propounded to the appellant the question: "You've had plenty of experience with lawyers, haven't you?" The objection "as being an improper remark" was sustained and the jury was instructed not to consider the question. The record reflects that the prosecutor's question came just after the appellant testified that he had pled guilty to the charge of possession of marihuana upon the advice of his counsel. In view of the prompt action of the court, no error is shown. See *Pearson v. State*, supra.

5. Appellant next complains of the State's admonition, "Don't answer until your lawyer has an opportunity to object." The objection was that the remark was improper, which the court sustained by stating, "No comment, please", and then instructed the jury not to consider the statement. No error is shown.

6. Appellant complains of a question by the State but does not cite the portion of the record where it was asked. Nothing is presented for review. *Peterson v. State*, supra.

7. The last contention is that error is reflected by a question propounded to the appellant regarding the gun he had in his possession at the time the offense occurred. The question was, "If it was somebody else's, you know, you would have stolen it." The objection to the question was sustained and the jury was instructed not to consider the same. *Rodgers v. State*, Tex.Cr.App., 486 S.W.2d 794.

We overrule appellant's contention that the cumulative effect of the occurrences constituted reversible error.

Finding no reversible error, the judgment is affirmed.

OPINION ON APPELLANT'S MOTION FOR REHEARING

ODOM, Judge.

The opinion concurring in part and dissenting in part on original submission, by the writer, is withdrawn.

The questions that concerned the writer regarding the constitutionality of Art. 37.071(b)(2), V.A.C.C.P., have been laid to rest by the Supreme Court of the United States in *Jurek v. Texas*, ____ U.S. ____, 96 S.Ct. 2950, 49 L.Ed.2d 929, 19 Cr.L. 3282. See also *Gregg v. Georgia*, ____ U.S. ____, 96 S.Ct. 2909, 49 L.Ed.2d 859, 19 Cr.L. 3250, and *Proffitt v. Florida*, ____ U.S. ____, 96 S.Ct. 2960, 49 L.Ed.2d 913, 19 Cr.L. 3276.

The motion for rehearing is overruled.

ROBERTS, Judge (concurring).

My dissenting opinion on original submission is withdrawn. The Supreme Court of the United States has resolved the questions I had about the constitutionality of Art. 37.071(b)(2), Vernon's Ann.C.C.P., in *Jurek v. Texas*, ____ U.S. ____, 96 S.Ct. 2950, 48 L.Ed.2d ____, 19 Cr.L. 3282 (1976). See also *Gregg v. Georgia*, ____ U.S. ____, 96 S.Ct. 2950, 48 L.Ed.2d ____, 19 Cr.L. 3250 (1976), and *Proffitt v. Florida*, ____ U.S. ____, 96 S.Ct. 2960, 48 L.Ed.2d ____, 19 Cr.L. 3276 (1976).

I agree that the motion for rehearing should be overruled.

ERNEST BENJAMIN SMITH, Jr., Appellant

NO. 49,809 vs. - - - - Appeal from DALLAS County

THE STATE OF TEXAS, Appellee

OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in the affirmance of this case but dissent to the majority's analysis and reasoning in its disposition of appellant's grounds of error numbers two, three, five, six and seven.

I.

In his second ground of error, appellant contends the evidence is insufficient to support the jury's finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." (Art. 37.071(b)(2), V.A.C.C.P.) Although I would hold this issue unconstitutionally vague, as stated in my opinion concurring in part and dissenting in part filed in Jurek v. State, 522 S.W.2d 934, I nevertheless am compelled to question the majority's disposition of this ground of error even within the framework of their own construction of that issue.

In my opinion filed in *Jurek*, supra, I observed:

> "Having mistaken vagueness for discretion, the majority naturally have failed to recognize the vagueness inherent in Art. 37.071(b)(2). The word 'probability' is not examined by the majority. This concept is at the core of the issue submitted under this subsection, yet the majority seek neither to define it nor to discuss its meaning. The essential indefiniteness of the word 'probability' is ignored."

Now the sufficiency of the evidence to support the jury finding that such probability exists has been challenged, and the majority are unable to adequately respond. As sufficient evidence the majority cite the following: (1)

the circumstances of the instant offense; (2) a marihuana conviction followed by no effort to rehabilitate himself or secure employment; (3) the testimony of Dr. Grigson, a psychiatrist, that appellant has a sociopathic personality disorder, for which there is no cure, as a result of which he lacks a sense of guilt and will continue to commit criminal acts of the same nature. The State, in its brief, relies solely upon the psychiatric testimony to support the jury's finding.

Apart from the psychiatrist's testimony, which I will discuss later, the State cites no evidence to support the jury's finding and the majority cite only the facts of the primary offense, a marihuana conviction, and a poor employment record. I fail to see how a five year probated sentence for possession of marihuana has any probative value on the issue of whether one will commit criminal acts of violence that will constitute a continuing threat to society. And if being unemployed has any probative value on that issue, perhaps the Legislature should make it a felony to be unemployed. I also reject the proposition that evidence of the nature and circumstances of the primary offense, *standing alone*, is sufficient evidence to support an affirmative answer to the "probability" special issue. The issue of the sufficiency of the evidence in this case, then, of necessity must turn upon the psychiatric testimony. But it is the psychiatric testimony, its implications and effect, and the majority's reliance on it, which raise my greatest doubts and apprehensions.

A profile of Dr. Grigson's testimony,[1] and its logical

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[1] The psychiatric testimony of Dr. Grigson may be summarized as follows. On direct examination he testified (1) to his credentials as a psychiatrist; (2) to the types of examinations administered by him to appellant; (3) to the results of those examinations; (4) that appellant is medically and legally sane; (5) that appellant has a sociopathic personality disorder; (6) to the characteristics of a sociopath; (7) that there are degrees of sociopathy and appellant is on the very severe end of that scale; (8) that the prognosis is appellant will continue his previous behavior or get worse; (9) that

WITHDRAWN

structure, may be accurately outlined as follows. A mental status examination was administered to appellant to determine the condition of his thinking, feeling and behavior, which consisted of five parts: (a) general appearance and behavior; (b) production of thought; (c) affect or mood; (d) content of thought; and (e) sensorium. None of the tests revealed anything abnormal or unusual except for one characteristic. From the affect or mood part of the examination, Dr. Grigson could find "absolutely no signs of any remorse or any type of guilt feelings." As a result of this single characteristic discovered in a one and a half hour interview, Dr. Grigson "absolutely" diagnosed appellant as "a very severe sociopath." More than once he testified to the basis for his diagnosis, and never once did he give any basis other than this: that appellant had no sense of guilt or remorse with respect to the commission of the offense for which he was on trial. Having made his diagnosis, he proceeded to testify to the characteristics of the sociopathic personality generally, and that there is no effective treatment for the sociopath. Without referring to any specific findings in the examination, Dr. Grigson testified that appellant

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appellant has no regard for other persons' property or lives; (10) that no treatment to improve his condition exists; (11) that appellant will commit criminal acts of violence that will constitute a continuing threat to society if given the opportunity to do so; (12) that appellant is a leader.

On cross-examination Dr. Grigson testified (1) that it is not known what causes a person to be a sociopath; (2) that, for the basis of his diagnosis, he spent approximately an hour and a half examining appellant but did not interview friends and relatives who knew appellant; (3) that he is certain appellant is a severe sociopath; (4) that his diagnosis of sociopathic personality disorder was based on the failure of appellant to show any guilt feelings or remorse with respect to the commission of the offense for which he was on trial; (5) that during the examination appellant was pleasant, cooperative, polite, intelligent, rational, courteous, and did not try to fake insanity; and (6) that sociopathic symptoms may show up as early as age four or five, or may not appear until age thirty.

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will continue his previous behavior, will constitute a continuing threat to society, and will commit criminal acts of violence.

Dr. Grigson's qualifications as a psychiatrist may be fine, but I find no testimony which qualifies him as an expert in predicting the future. Yet his testimony more than once contains his opinion of how appellant *will* behave in the future, even to the point of expert testimony on the very issue as worded and submitted under Art. 37.071(b)(2), V.A.C.C.P. It is my opinion that such future-telling testimony is admissible under no theory of law and prejudicial beyond relief, requiring reversal of this case. If the majority find future-telling testimony proper, the Legislature should provide for the trial for crimes in futuro, so that criminals may be removed from our midst before they do their damage, but I can subscribe to no such theory.[2]

I also question the logical structure of Dr. Grigson's testimony. It appears he testified: (1) appellant lacks a conscience; (2) sociopaths lack a conscience; (3) therefore, appellant is a sociopath. The fallacy of this is obvious, but it did not stop here. Other characteristics of sociopaths were described and attributed to appellant, despite the fact that no examination findings of such other traits were presented. The expert testimony went far afield of any demonstrated logical connection to the results of appellant's examination by the psychiatrist.

I next question the state of the medical sciences in the field of psychiatry with respect to the sociopathic personality disorder. Dr. Grigson testified that the causes are unknown and no cure or treatment is known. He also testified that symptoms may appear as early as age four

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[2] Is the majority's position best stated by the Queen in Lewis Carroll's *Through the Looking Glass* (Modern Lib. Ed., p. 226)?

"For instance, now, [the Queen states to Alice] * * * there's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all."

years, or that given proper environmental conditions no overt behavior or manifestations may appear. Although he testified it is not known what causes a sociopathic condition, he admitted much research has been done to find an answer. The writings in the field support that assertion and reflect that numerous theories of the cause have been advanced. One textbook on abnormal psychology[3] discusses the history, theory, and description of the sociopathic personality, which has been studied since the early 1800's and has been variously labelled as moral insanity, *manie sans delire*, psychopath, constitutional psychopath, and sociopath. Theories have attributed the cause to heredity, brain damage, early family relations, inadequate socialization, inadequate learning capabilities, stimulation-seeking, and low anxiety level. Primary and secondary sources cited in the brief discussion of the sociopathic personality contained in the above cited text number close to fifty.

In Romero v. State, 493 S.W.2d 206, with respect to the admission of the results of polygraph examinations, this Court quoted with approval the following rule from Frye v. United States, 54 App.D.C. 46, 293 F. 1013, 1014 (1923):

> ". . . Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

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[3] Ullmann, L. P., and Krasner, L., *A psychological approach to abnormal behavior*, Englewood Cliffs, N.J.: Prentice-Hall, 1969, pp. 444-457.

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This test has also been applied to evidence derived from other scientific theories and devices by federal courts.[4] There is no reason why it should not be applied to scientific theories in the field of psychiatry.

In Hopkins v. State, 480 S.W.2d 212, at 221, speaking to psychiatric evidence of another nature, the following observations were made regarding that field of medicine:

> "The state of psychiatry is such that it is more an art than a science. There exists a great deal of divergency of opinion among eminently qualified and learned men of the profession. Also, being of the nature that it is, psychiatric opinion is not only often divergent, but is often inexact."

While it is true that the profession of psychiatry has much to contribute to that of law, and on certain issues the evidence of the psychiatrist can be of great assistance to the trial of a case, in view of the numerous speculations made on the basis of the single determination that appellant lacked a sense of remorse for the commission of the offense for which he was on trial, in view of the issue upon which those speculations were presented, and in view of the weight which those speculations by an expert undoubtedly carried, I am unable to find that much of the testimony offered was from this side of the twilight zone. The introduction of such highly prejudicial psychiatric speculations deprived appellant of a fair trial at the punishment stage.

These several reasons reveal that the psychiatric testimony contributes nothing to the State's burden on special issue number two. Accordingly, the only arguably probative evidence on this issue remaining of those enumerated by the majority consists of the circumstances of the instant offense. How much can one tell from a single event? I would hold as a matter of law that

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[4] See United States v. Addison, 498 F.2d 741 (D.C.Cir. 1974); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973); United States v. Stifel, 433 F.2d 430 (5th Cir. 1970).

the circumstances of the offense for which one is on trial, *standing alone*, are insufficient to prove, *beyond a reasonable doubt*, the probability that the offender will commit criminal acts of violence *constituting a continuing threat to society*.

The issue of the sufficiency of the evidence to support this special issue is one of first impression. This State does not even have an authoritative interpretation of what the issue means. I dissent to the majority's failure to address the probative value of the evidence they so easily find sufficient on this little understood issue.

II.

In his third ground of error, appellant contests the application of the law of principals to the special issues in Article 37.071(b)(1) and (3), V.A.C.C.P. In response the majority assert without elaboration, explanation, or authority, "To agree with such contention would require that we ignore this Court's interpretation of the law of principals." The law of principals dictates, "Where several people are acting together in pursuit of an unlawful act, each one is liable for collateral crimes, even though unplanned and unintended, committed by other principals if those crimes are the foreseeable, ordinary and probable consequences of the preparation or execution of the unlawful act." Thompson v. State, 514 S.W.2d 275. (Cf. V.T.C.A. Penal Code Chapter 7.) I am aware of no cases that have held special penalty provisions may be applied to one party on the basis of their applicability to a co-principal. The majority's holding would support enhancement of a first-time offender's punishment to life imprisonment under Article 63, V.A.P.C., if his co-principal were twice previously convicted of a felony. Furthermore, the reasoning of the majority would dictate that not just the first and third special issues, but all three, may be answered on the basis of the role and characteristics of co-principals rather than solely in response to the individual defendant. The special issues were framed by the Legislature in parallel construction, each issue

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addressing the individual defendant:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." (Art. 37.071(b), V.A.C.C.P.)

Since the majority apply the law of principals to the first and third issues, why not also to the second, and let the life of the convicted man rest upon whether there is a probability that one of his co-principals will commit criminal acts of violence that would constitute a continuing threat to society? The absurdity of applying the law of principals to these special issues is manifest.

The majority's automatic application of the law of principals to special punishment issues constitutes a radical departure from the ancient concept of individualized punishment, a cornerstone of our system of criminal justice. It should not be so lightly abandoned.

III.

I dissent to the majority's disposition of appellant's fifth and sixth grounds of error which challenge the constitutionality of Article 37.071, V.A.C.C.P. I believe that statute to be unconstitutional for the reasons stated in my opinion concurring in part and dissenting in part in Jurek v. State, 522 S.W.2d 934.[5]

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[5] See also Judge Roberts' dissenting opinion in *Jurek*.

IV.

In his seventh ground of error, appellant argues that the oath required of jurors in a capital case[6] imposes "an unrealistic condition on prospective jurors. No juror, or at least only a *minute* percentage could deliberate issues of fact without being affected by the spectre of death or the gift of life." Appellant then argues that the oath prevents a defendant from having a jury drawn from a cross-section of the community in that it eliminates many truthful and conscientious veniremen.

The first part of this argument was accepted by the majority as the basis for the reversal in Hovila v. State, ____ S.W.2d ____ (No. 49,396, April 30, 1975), where it was held:

> "While the new statutes provide that the jury shall take an oath that they will not let the penalty involved affect their deliberations and requires them only to answer questions while the judge actually assesses the punishment based on such answers, the fact remains that the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment. *To say that the jury's answers would not be affected by their attitude toward the death penalty* as a punishment for crime simply because they will not bring forth the ultimate verdict *would be to disregard the obvious.* We will not engage in such tenuous reasoning." (Emphasis added.)

The second part of appellant's argument follows logically from the first: if the oath is required, but will not be followed, only those who falsely state they will be uninfluenced may serve and all who truthfully admit they will be influenced will be excluded. If the majority in Ho-

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[6] Article 1257(d), V.A.P.C., provides in part:

> "... No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

vila, supra, were correct,[7] then appellant's argument is logically sound. In spite of this, the majority have neglected to answer this portion of appellant's seventh ground of error. I dissent to their failure to do so.

V.

In summary, I dissent to the majority's failure to address in an adequate manner the issue of the sufficiency of the evidence to show the probability required under Art. 37.071(b)(2), supra; I dissent to the majority's summary application of the law of principals to the special punishment issues; I dissent to the majority's failure to address that portion of appellant's argument directed at the jury selection process; and I adhere to my views expressed in Jurek v. State, supra, upon which reasoning I would reform the punishment to life and affirm the conviction.

I therefore concur in the affirmance of this conviction but would reform the judgment to life.

ODOM, Judge

(Delivered February 18, 1976).

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[7] Note my dissent in Hovila v. State, supra, on several grounds, including inconsistency with Jurek v. State, supra.

ERNEST BENJAMIN SMITH, Jr., Appellant

NO. 49,809 vs. - - - - Appeal from DALLAS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

I concur completely with the dissenting opinion of Judge Odom, except that I would reverse this case for the reasons stated in my dissenting opinion in Jurek v. State, 522 S.W.2d 934, 946-950 (Tex.Cr.App. 1975). See my concurring statement in Hovila v. State, ____ S.W.2d ____, ____ (Tex.Cr.App. 1976), No. 49,396, delivered April 30, 1975; State's Motion for Rehearing overruled February 11, 1976.

ROBERTS, Judge

(Delivered February 18, 1976).

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Prisoner's name: Ernest Benjamin Smith

Prison number: 000-515

Place of Confinement: Ellis Unit, Texas Department of Corrections

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, and	§	No. CA 3-77-0544-F
	§	
_____ WARDEN ELLIS UNIT, TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
Respondents.	§	

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY -
Filed April 21, 1977

To the Honorable _____, Judge of the District Court for the Northern District of Texas, Dallas Division:

[*Preliminary explanation:* The allegations of paragraph 1 through 17 of this petition are in the form dictated by the Model Form for Use in Applications for Habeas Corpus under 28 U.S.C. § 2254, prescribed by the Rules

Governing Section 2254 Cases in the United States District Courts, 44 U.S.L.W. 4554-4556 (April 26, 1976). Paragraphs 1 through 11 state the history of prior state-court proceedings; paragraph 12 states the federal constitutional claims presented; paragraphs 13 through 17 contain required technical information.]

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

(a) The 195th District Court of the State of Texas, in and for Dallas County.

(b) Dallas, Dallas County, Texas.

2. The date of the judgment of conviction is March 26, 1974. An amended sentence of death was entered on March 22, 1977.

3. The sentence is that Ernest Benjamin Smith be put to death by electrocution.

4. The nature of the offense involved is that Ernest Benjamin Smith was charged with murder with malice aforethought, in violation of section 1257(b)(2) of the Texas Penal Code, in that he allegedly participated in a robbery in the course of which another individual, one Howie Ray Robinson, killed William Moon.

5. Ernest Benjamin Smith's plea was not guilty.

6. Trial of the issues of guilt or innocence and of sentence was had before a jury.

7. Ernest Benjamin Smith testified at trial of the issue of guilt or innocence. He did not testify at trial of the issue of sentence.

8. Ernest Benjamin Smith appealed his conviction and death sentence.

9. The facts of Ernest Benjamin Smith's appeal are as follows:

(a) The Court of Criminal Appeals of Texas affirmed the judgment of the trial court on February 18, 1976, in *Smith* v. *State*, 540 S.W.2d 693. (Judges Odom and Roberts dissented with respect to the sentence of death, in separate opinions which were subsequently withdrawn and are unreported.)

(b) The Court of Criminal Appeals of Texas denied Ernest Benjamin Smith's motion for rehearing on July 14, 1976.

(c) The Supreme Court of the United States denied Ernest Benjamin Smith's petition for a writ of certiorari on March 7, 1977. ____U.S.____, 45 U.S.L.W. 3601. (Justices Brennan, Marshall and White were of the opinion that certiorari should be granted).

10. Other than the appeal described in paragraphs 8 and 9 above, the only petitions, applications, motions or proceedings filed or maintained by Ernest Benjamin Smith with respect to the judgment of March 26, 1974 of the 195th Judicial District Court of Texas are those described in paragraph 11 below.

11. (a) On April 18, 1977, pursuant to Article 11.07 of the Texas Code Crim. Pro., a Petition for Writ of Habeas Corpus was filed in the 195th Judicial District Court of Texas by counsel on behalf of Ernest Benjamin Smith. The Petition was denied by the Honorable R. T. Scales, Judge of the 195th Judicial District, on April 18, 1977, without a hearing.

(b) On April 19, 1977 pursuant to Article 11.07 of the Texas Code Crim. Pro., a Petition for Writ of Habeas Corpus was filed in the Texas Court of Criminal Appeals by counsel on behalf of Ernest Benjamin Smith. This Petition was denied on April 19, 1977, without a hearing. (A Certified Copy of the April 19, 1977 Order of the Texas Court of Criminal Appeals denying Ernest Benjamin Smith's Petition is annexed hereto as Exhibit A.)

12. This petition is directed to Ernest Benjamin Smith's conviction and to his sentence, which were obtained and imposed in volation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as described more fully herein.

INTRODUCTORY FACTS

Petitioner's conviction and sentence of death were the result of a convenience store robbery which was carried

out by three men and resulted in the shooting death of a night clerk. The unrefuted evidence is that petitioner did not fire a shot and that the clerk was killed by Howie Ray Robinson. R. 2672, 2739.[1] After petitioner and Robinson entered the store and announced their intention to hold it up, the clerk (who had access to a gun located under the counter, R. 2740, 2674, and customarily kept a second gun in his pocket when he worked at night, R. 2592-93), reached for something. T. 2672, 2738. The record contains unrefuted evidence that the gun which petitioner was carrying was a gun which would not fire and that petitioner knew that it would not fire. R. 2732-33, 2913-14. The evidence is in conflict as to whether petitioner nevertheless attempted to fire the gun when he saw the clerk reach for something. R. 2672, 2738-39, 2743, 2762-63, 2950. The evidence is also in conflict as to whether, at the same time, petitioner said to Robinson, "'Look out, Howie,'" R. 2738, or words to that effect, R. 2950, or "'Get him Howie,'" R. 2672.

Affirmative jury responses to the issues determinative of petitioner's sentence of death followed testimony by his step-mother and aunt as to his truthfulness, loyalty, scholarliness and dependability, and his honorable discharge after service in Vietnam, R. 2919-20, 2920-23, and confirmation, by the owner of the gun petitioner was carrying during the robbery, that the gun had been defective. R. 2913-14. The State presented only the testimony of Dr. James Grigson who testified that petitioner was a sociopath and therefore likely to commit future acts of criminal violence, R. 2943-47, and reported his recollection of petitioner's account to him of the circumstances surrounding the shooting, R. 2950-53, 2959-60, 2960-61.

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[1] Citations to the Record on Appeal are designated "R." followed by the appropriate page number.

GROUNDS OF ILLEGALITY OF PETITIONER'S CONVICTION AND DEATH SENTENCE

A. Petitioner's Death Sentence is a Cruel and Unusual Punishment Forbidden by the Eighth Amendment to the Constitution of the United States, and Deprives Him of Due Process of Law and Equal Protection of the Laws in Violation of the Fourteenth Amendment to the Constitution of the United States.

(1) Death is a disproportionately severe and therefore excessive punishment in cases like petitioner's where human life has not been taken deliberately by the individual offender who is sentenced to die.

(a) Imposition of the death penalty in a case where a life has not been taken deliberately by the individual sentenced to die fails to accord with contemporary values concerning the dignity of man.

(b) Public opinion does not support use of the death penalty in cases in which life was not taken deliberately by the individual defendant himself.

(c) The Texas legislative enactments which have been interpreted to authorize the execution of non-triggermen do not evince public support for use of the death penalty in such cases, since it was not the intent of the legislature that the enactments would have such broad sweep.

(d) National and international use of the death penalty against non-triggermen has shown a dramatic and consistent decline culminating, in all American jurisdictions and in virtually all other jurisdictions, in *de facto* abolition.

(e) Prosecutors with discretion to effect a less than capital sentence in the case of a non-triggerman do so in the overwhelming majority of cases.

(f) Jurors with discretion to effect a less than capital sentence in the case of a non-triggerman do so in the overwhelming majority of cases.

(g) Executive officers with discretion to effect a less than capital sentence in the case of a non-triggerman do

so in the overwhelming majority of cases.

(h) Use of the death penalty against non-triggermen is inconsistent with contemporary morality and standards of decency.

(2) Death is a disproportionately severe and therefore excessive punishment in petitioner's case, in view of the circumstances of the particular offense and the character, record and life history of the individual offender.

(a) Petitioner's sentencing hearing occurred on March 26, 1974. It was not until April 16, 1975 that the Texas Court of Criminal Appeals announced its views as to the range of issues that might be considered "[i]n determining the likelihood that the [capital] defendant would be a continuing threat to society." *Jurek* v. *State*, 522 S.W.2d 934, 939-40 (Tex.Cr.App. 1975). It was not until July 2, 1976 that the Supreme Court of the United States held that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, ____U.S.____, 49 L.Ed.2d 944, 961 (1976).

(b) Numerous circumstances, some within and some outside the trial record, are present in petitioner's case and are, by common consensus, deemed to warrant mitigation of sentence in capital cases. They include:

(i) The record of dependability, character, and good citizenship which petitioner demonstrated during the first 25 years of his life.

(ii) His record of service in Vietnam.

(iii) The fact that his only prior conviction was for possession of a small matchbox partially filled with marijuana, for which he was sentenced to probation.

(iv) Extenuating pressures leading to his participation in the crime.

(v) The fact that he did not shoot the victim.

(vi) The fact that, contrary to the testimony of Dr. Grigson,[2] petitioner suffers no antisocial personality

[2] Reliance upon a diagnosis by Dr. Grigson similar to that made in

disorder, and his prospects for rehabilitation are excellent.

(vii) The fact that, contrary to the testimony of Dr. Grigson, petitioner is remorseful regarding the killing of Mr. Robinson's victim.

(c) These factors are not outweighed by aggravating circumstances.

(3) **The Texas death penalty statutes, as interpreted and applied in petitioner's case, fail to allow constitutionally adequate consideration of mitigating circumstances.**

(a) Petitioner realleges Paragraph 12 (A) (2) (a) above. Although "in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing to consider mitigating circumstances" [(*Jurek* v. *Texas*, 49 L.Ed.2d 929, 940 (1976)] and "[t]hus, the constitutionality of the Texas procedures turns on whether [they] . . . allow consideration of particularized mitigating factors" (*ibid.*), these requirements were neither established, known, nor observed at the time of petitioner's trial.

(b) The fact that the defendant was not the triggerman in a felony murder is, by common consensus, mitigating and worthy of consideration in the assessment of punishment.

(c) The relative culpability of one of several participants in a felony is, by common consensus, worthy of consideration in the assessment of punishment, and such consideration is likely to point to mitigating circumstances.

(d) However, the Texas capital punishment statutes, as interpreted and applied by the Court of Criminal Appeals in petitioner's case, require that the death penalty be meted out to non-triggermen on the basis of the applicability to the triggerman of the special questions

this case has been found, by a panel of the Fifth Circuit, to be "clearly erroneous" in that his findings were "discredit[ed]" by "extensive medical and lay evidence" to the contrary. *Bruce* v. *Estelle*, 536 F.2d 1051, 1060-61 (C.A.5, 1976).

defined by Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (1) and (3). Thus, defendants like petitioner are sentenced to die on the basis of the culpability of another person's conduct, and they are denied consideration of relevant mitigating circumstances arising from their own less culpable role in the offense.

(e) The only death-sentencing issue under Texas law which requires or permits the jury to consider the character and record of the individual non-triggerman defendant such as petitioner is the issue defined by Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (2), relating to a "probability" of future dangerousness. This issue precludes consideration (unless a jury is willing to ignore the statute) of numerous factors which are mitigating by common consensus, but irrelevant to the "probability" issue. They include:

(i) The youth of an offender who was not, at the time of his offense, under the domination of another.

(ii) Evidence that the defendant will not kill (again) or that any "acts of criminal violence" which he may commit in the future will not result in serious injury.

(iii) A history of deprivation and misfortune which moderates blameworthiness, but does not negate the existence of "a probability" that the defendant will commit future acts of criminal violence.

(iv) The magnitude of the probability that the defendant will commit future acts of criminal violence.

(v) The possibility or probability that the defendant will *not* commit future acts of criminal violence.

(4) **The death penalty is unjustified as a means for achieving any legitimate governmental end and is therefore excessive.**

(a) The death penalty provided by Texas law violates the principle that a criminal sanction "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg* v. *Georgia*, 49 L.Ed.2d 859, 880 (1976).

(b) Public sentiment for retribution is not so strong as to require or justify use of the death penalty.

(c) Executions do not have an identifiable deterrent effect.

(d) Executions set socially sanctioned examples of, and provide an inducement to violence.

(e) There is no penal purpose served by execution which is not more effectively or more efficiently served by life imprisonment.

(5) **The penalty of death for an offender like petitioner who did not take human life himself is excessive because it is not warranted by any legitimate governmental purpose and is repudiated by the evolving standards of decency of contemporary society.**

(a) Petitioner realleges paragraphs 12 (A) (1) (b)-(h) and (4) (a)-(e) above.

(b) Public sentiment for retribution in the case of a non-triggerman is not so strong as to require or justify use of the death penalty.

(c) Executions of non-triggermen do not deter the commission of felonies, such as armed robbery, the reasonable consequence of which might be the death of the victim or another, nor do they deter the commission of murder.

(d) There is no penal purpose served by the execution of non-triggermen which is not more effectively or more efficiently served by life imprisonment.

(6) **The present Texas death penalty procedures, as applied since their enactment in 1973, have resulted in arbitrary and capricious imposition of the death penalty, and were applied to sentence this petitioner to death in an arbitrary and capricious manner.**

(a) The Supreme Court of the United States has upheld the Texas capital punishment statutes on their face only upon the assumption that they will assure that sentences of death are not wantonly or freakishly imposed. As those statutes have been applied since 1973, however, death sentences in Texas are in fact imposed in an arbitrary and capricious, wanton and freakish pattern.

(b) Cases similar to that of petitioner in all respects, including the age, prior record, relative culpability in

connection with the offense, and life and character of the accused, result, with overwhelming greater frequency, in lesser punishments than death.

(c) Cases more aggravated than that of petitioner in all respects, including the age, prior record, relative culpability in connection with the offense, and life and character of the accused, result, with overwhelming greater frequency, in lesser punishments than death.

(d) There is no rational, constitutionally permissible basis for distinguishing the few cases in which the death penalty has imposed from the many cases in which it has not been imposed.

(e) There is no rational, constitutionally permissible basis for distinguishing the few cases in which the death penalty has been imposed upon non-triggermen in felony-murder cases from the many such cases in which it has not been imposed.

(f) The Supreme Court's decision to uphold the Texas capital punishment statutes was based, in part, upon the assumption that prompt judicial review of the jury's decision in a court with statewide jurisdiction provided a means to promote the evenhanded, rational, and consistent imposition of death sentences. However, the Texas Court of Criminal Appeals has not reviewed capital sentences to assure that they are evenhanded, rational and consistent, and it has held that it lacks authority to do so.

(g) Under Texas law the death penalty must be imposed if the jury makes certain findings against the defendant. The sentencing procedure is so rigid as to preclude consideration of factors commonly deemed mitigating, including even such significant facts as whether the defendant was the triggerman. This rigidity increases the likelihood of arbitrariness.

(7) **Under the present Texas death penalty procedures, and particularly in cases in which human life is not taken by the offender himself, the death penalty is discriminatorily applied against defendants of ethnic minority extraction, impoverished defendants, and male defendants, upon the sole**

ground of race, poverty and sex; and petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice.

(a) The death penalty in the United States and in the State of Texas has been discriminatorily imposed against ethnic minorities, poor persons and males.

(b) The death penalty for crimes less serious than the deliberate taking of human life has been discriminatorily imposed against ethnic minorities, poor persons and males.

(c) The death penalty for non-triggermen has been discriminatorily imposed against ethnic minorities, poor persons and males.

(d) The probability of execution is overwhelmingly greater in the case of a black non-triggerman than in the case of a white non-triggerman.

(e) General use of the death penalty for non-triggerman today would be intolerable to juries and the public. Continued, occasional use of the death penalty against non-triggermen is possible only because an absence of empathy on the part of the majority population, resulting from racial and class differences, serves to blunt moral and political reaction against an otherwise intolerable practice.

(8) **The prediction of a probability of future dangerousness required by Texas law and made in petitioner's case as the basis for the imposition of the death penalty is so uncertain, vague, unreliable and prone to error on the side of overinclusion that it fails adequately to channel the sentencing decision patterns of juries, and is arbitrary.**

(a) Under the terms of Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (2), the lives of defendants like petitioner who are convicted of capital offenses depend upon the prediction that there is "a probability" that they will "commit criminal acts of violence" that will "constitute a continuing threat to society."

(b) The reliable prediction of future dangerousness is impossible.

(c) The reliable prediction of the "probability" defined by Art. 37.071 (b) (2) is impossible.

(d) Specifically, reliable prediction of the kinds described in paragrahs 12 (A) (8) (b)-(c) above cannot be made in the case of an offender like petitioner, who has not personally committed a deadly assault.

(e) Predictions of the future dangerousness of individuals in the context of legal proceedings conducted for purposes of criminal sentencing or involuntary commitment invariably err on the side of overinclusion.

(f) The classification of offenders who are to be executed on the basis of a "probability" of future dangerousness fails to set reasonably clear guidelines for triers of fact in order to prevent arbitrary and discriminatory enforcement, because the classification is universal, and thus unjustifiably broad, or so vague as to be incomprehensible.

(g) The classification of offenders who are to be executed on the basis of a prediction of "criminal acts of violence that would constitute a continuing threat to society" similarly fails to channel sentencing discretion because the classification is unjustifiably broad and so vague as to be incomprehensible.

(9) **The finding of petitioner's future dangerousness was based upon an inadequate inquiry and insubstantial evidence, with the result that the procedure used to sentence him to die failed to provide a reliable determination of the appropriateness of the death sentence in this specific case.**

(a) The finding of petitioner's jury that there was a probability of his future dangerousness was made through procedures and upon evidence that failed to assure the requisite reliability in the determination that death is the appropriate punishment herein.

(b) The State's entire case as to the probability of petitioner's future dangerousness was the testimony of a single forensic psychiatrist, Dr. James Grigson, who had conducted no investigation, testing, or evaluation other than the traditional "mental status examination," R. 2937, which was, by his testimony, completed in an

interview lasting approximately one and one half hours and which petitioner recalls as having consumed approximately forty minutes.

(c) The principal basis for Dr. Grigson's diagnosis was his failure to detect in petitioner any signs of remorse or guilt for the crime of which he was charged. R. 2941, 2949, 2951, 2960. Petitioner was precluded from testifying as to whether he did in fact regret that the robbery and shooting had occurred. R. 2744.

(d) Responsible prediction of future dangerousness on the basis of a single psychiatric interview of up to an hour and a half in length is impossible.

(e) The examination conducted by Dr. Grigson was inadequate to form the basis of a responsible prediction of future dangerousness.

(10) **Electrocution is an unnecessary cruel means of execution.**

(a) Electrocution involves physical torture and is excessively cruel and unnecessary, in this age of painless drugs, as a means of extinguishing human life.

(b) In the light of contemporary human knowledge, electrocution as a means of execution serves no purpose other than the gratuitous infliction of suffering.

(11) **The Texas death penalty statutes, as interpreted and applied in petitioner's case, make the life or death of a defendant who is convicted of a homicide that he did not personally commit turn upon (i) the intention and "reasonable expectation" of a person other than the defendant, and (ii) the unreasonableness (in response to provocation) of a person other than the defendant, which classifications are wholly irrational, arbitrary, and lacking in any nexus or relationship to any conceivable purpose for inflicting the death penalty upon a particular offender.**

(a) Petitioner realleges paragraph 12 (A) (3) (d) above.

(b) The interpretation of Vernon's Texas Code of Crim. Proc. Ann., Art. 37.071 (b) (1) and (3) which was employed to authorize petitioner's death sentence

makes a non-triggerman susceptible or immune to capital punishment on the sole ground of mental processes of the triggerman that have nothing to do with the conduct, character, thought or culpability of the non-triggerman. Offenders like petitioner are thereby put to death or spared by virtue of an irrational classification which bears no relationship to the purposes of capital punishment.

B. The Introduction of the Testimony of Dr. Grigson at Petitioner's Trial Violated His Privilege Against Self-incrimination and His Rights to Fair Notice and Effective Assistance of Counsel.

(1) Petitioner was examined by a psychiatrist, Dr. James Grigson, while detained in custody prior to trial. Dr. Grigson told petitioner that the Court had sent him to conduct a psychiatric evaluation of petitioner. The record is silent, and neither petitioner nor his counsel has information, as to why a psychiatric evaluation was ordered prior to his trial.

(2) Permission of petitioner's counsel was not obtained prior to the psychiatric interview, nor was counsel notified that the interview was to take place.

(3) The record contains a letter dated February 28, 1974 from Dr. Grigson to the Court which sets forth a one-paragraph "summary" of Dr. Grigson's psychiatric evaluation of petitioner; concludes "that Earnest [sic] Benjamin Smith, Jr. is aware of the difference between right and wrong and is able to aid an attorney in his defense;" and adds, "If I can be of any further help to you regarding this case, please let me know. He is a severe sociopath." R. 24.

(4) By order filed January 4, 1974, upon petitioner's motion, the State's attorney was directed "to list all the State's witnesses whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state [sic] and the punishment stage." T. 21-22.

(5) Dr. Grigson was not listed as a State's witness, and counsel for petitioner did not know until approx-

imately ten minutes before Dr. Grigson testified that he was to be a witness for the State.

(6) On at least one occasion, on an unknown date prior to the commencement of petitioner's trial, the district attorney consulted with Dr. Grigson regarding his findings concerning petitioner, R. 2928, and told Dr. Grigson that he would be asked to testify at petitioner's trial, R. 2930.

(7) The circumstances set forth in paragraphs 12(B)(1)-(6) above, prevented petitioner's trial counsel from effectively defending against the charge that there existed a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society.

(8) Petitioner was not told before or during the psychiatric interview that his statements during the interview could be used against him at trial.

(9) Petitioner was not told before or during the psychiatric interview that he had a right to consult with his counsel and/or to have counsel present.

(10) Petitioner was not told before or during the psychiatric interview that he had a right to remain silent.

(11) Petitioner was not told before or during the psychiatric interview that he had a right to terminate the interview at any time.

(12) No circumstance pertaining to the interview provided notice to petitioner that it had any adversarial purpose or that his statements could form the basis of, or be used as evidence to support, a determination that he should be put to death.

(13) After defense counsel's attempt to protest had been overridden by the Court, R. 2950, Dr. Grigson related on cross examination, R. 2950-56, and redirect examination, R. 2960-61, his recollection of facts of the crime as told to him by petitioner during the psychiatric interview.

(14) Petitioner was unwittingly induced to provide, by his own statements, the only evidence offered by the prosecution to suggest that he might be dangerous in the future and should therefore be put to death.

C. The Prosecuting Attorney Made Persistent, Immaterial, Improper References to and Suggestions of Unrelated Criminal Activity By Petitioner, at Both the Guilt and Sentencing Phases of Petitioner's Trial.

(1) By order of the trial court, issued upon petitioner's motion, the State was instructed "to not mention, infer, or in any way allude to any extraneous offense against defendant which has not resulted in *final* conviction," that "the State not put a witness on the stand to infer, directly or indirectly, that defendant has committed any offense other than the one with which he is charged in this proceeding," R. 65, and that "the prosecutors by instructed, and they instruct their witnesses, not to refer to, or allude to defendant by the nickname of 'dirty Red,' . . . a juvenile reference to the color of defendant's skin," or by any other nickname, R. 64.

(2) In cross-examining petitioner about his marijuana conviction, the prosecutor asked "You've had plenty of experience with lawyers before haven't you?" R. 2752

(3) In asking petitioner who had carried a box of change from the robbery, the prosecutor elicited the answer, "I can't even remember. I don't know." R. 2778. The prosecutor continued:

"Q. Whole event was so — didn't mean any more to you than anything, did it?

Q. Well, when a person is killed — I've seen a lot of people killed overseas and well, it does register on your mind, you know. You see somebody and you don't know what happened and — well, I hadn't been around anything like that, you know, since I had been home.

Q. Run that past me again, I think you said what I thought you said.

A. When — say for instance —

Q. You're talking about a robbery? You haven't been around one of those?" (R. 2779).

(4) The prosecutor questioned petitioner about the shoes he was wearing on the day of the crime, as follows:

"Q. . . . You were in your sneakers?

A. Good shoes are shoes I didn't wear —
Q. When you're robbing?" (R. 2795).

(5) Referring to petitioner's activities on September 29, the day upon which the Wheeler gun was sold, R. 2796, and upon which petitioner was said to have appeared in a store carrying a gun, T. 2839-2839, the prosecutor questioned petitioner as follows:

"Q. Okay. Now, of course, you hadn't planned on running into George Holden when you went over to Troy Brown's house?
A. I didn't see him.
Q. You weren't planning on running into him, were you?
A. No. Well, I didn't know where he was, really.
Q. No reason for you to think that George Holden would want to get some more money or anything that night?
A. (Nods head from left to right)
Q. I'm talking about the next night.
A. I was pretty nervous. I was going to stay home, regardless.
Q. Uh-huh . . ." (R. 2797-2798).

(6) The prosecutor asked the officer who reported petitioner's confession: "Under what name or names did you know of . . . [petitioner]?" After an objection to the question was sustained, the following exchange occurred:

"Q. (by Mr. Mulder) Without going into what name you knew him by, did you know him by a street name or a calling name?
A. Yes, sir, I did.
Q. It was other than Ernest Benjamin Smith?
A. Yes, sir. It was Dirty Red." (R. 2663)

(7) A second state witness identified prisoner as "Red," and questioning by the prosecutor proceeded as follows:

"Q. You said there was another called Red?
A. Right.
Q. Is that the name you knew him by?
A. Yes.

Q. Do you see Red in the Courtroom today?
A. Yes." (R. 2809)

(8) A third state witness also identified petitioner as Red, R. 2822, and when the prosecution asked "Was it just Red or was it something Red?," the witness responded that "it was Dirty Red." R. 2823.

(9) On rebuttal, the state presented two witnesses who testified that petitioner had entered the stores in which they were working as cashiers, carrying a gun which was described by one as being an automatic, six inches long, metallic in color with a pearl handle, R. 2835-2836, and by the other as a "white pearl handled gun with a chrome barrel, automatic," R. 2839. Although petitioner had testified on cross examination that he did not "own" a pistol, R. 2732, there had been no evidence whatsoever regarding ownership, possession or use of a gun that resembled in any way the gun described by these witnesses.

(10) Petitioner had no prior record other than the marijuana conviction described in paragraph 12(A)(2)(b) above, and the prosecution did not prove the commission of any other crime.

(11) The jury was not instructed to disregard the testimony described above, but was permitted to use it in determining guilt *and* in determining the issues dispositive of petitioner's sentence. The prosecutor relied upon some of this improper evidence [*Smith v. State*, 540 S.W.2d 693, 698 (Tex.Cr.App. 1976)] in his closing argument at the sentencing hearing (R. 2973).

(12) The introduction of the testimony described in above was a contrivance by the prosecution to obtain a conviction and sentence of death. Its cumulative result was prejudicial and a denial of the process due when life is at stake in a criminal proceeding.

D. An Oral Statement Was Obtained From Petitioner Involuntarily, In Derogation and Without Effective Waiver of His Privilege Against Self-incrimination and His Right to Counsel.

(1) Petitioner's oral statement to Officer C. E. Lewis was admitted at trial.

(2) This statement was obtained from petitioner involuntarily, without a knowing and intelligent waiver of his right to counsel and of his privilege against self-incrimination.

(3) Petitioner did not at any time give or sign a written, inculpatory statement, but sought to exercise his privilege to remain silent and to preserve his right against self-incrimination.

(4) Petitioner was arrested on October 5, 1973. R. 2706.

(5) Counsel was first appointed for petitioner by order dated October 25, 1973. R.9.

(6) John F. Simmons, the attorney appointed by the October 25 order, was first notified on his appointment to petitioner's case on October 27, 1973 and first saw petitioner on November 4, 1973.

(7) On the date of the order appointing counsel for petitioner, Officer C. E. Lewis interviewed petitioner in the absence of counsel.

(8) Officer Lewis advised petitioner (a) that he was not seeking evidence which could be used at trial; (b) that oral statements were inadmissable at trial; (c) that the gun taken during the robbery had belonged to the deceased, William Moon; (d) that the family of the deceased wanted very much to recover the gun; and (e) that the purpose of his interview was to determine its location (see R. 2666). The gun taken during the robbery was, in fact, the property of George Wheeler, R. 2584, and that fact was known to officer Lewis when he interviewed petitioner on October 25, 1973. Petitioner's subsequent oral statement was deemed admissable at trial because it resulted indirectly in discovery by the police of "fruits of the crime," *i.e.*, the pistol belonging to George Wheeler. R. 75.

E. The Process of Selecting Petitioner's Trial Jury In Which Veniremen With Conscientious Objections to the Death Penalty Were Systematically Excused for Cause Without Adequate Inquiry Upon Voir Dire Examination, Violated Petitioner's Rights Under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

(1) Petitioner was denied trial by a jury selected through fair procedures, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(a) Persons opposed to the imposition of capital punishment in the case of non-triggerman do not thereby make it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Witherspoon v. Illinois*, 391 U.S. 510, 522 n. 21 (1968) (emphasis in original).

(b) Despite two written, contemporaneous motions opposing the practice, R. 26-28, 29, eleven prospective jurors who otherwise favored the death penalty were excused — eight for cause and three by agreement — because they expressed general opposition to use of the death penalty against a non-triggerman; expressed an inability, or an uncertainty regarding their ability, to impose a death sentence upon a non-triggerman; or stated that the penalty would affect their deliberations in the case of a non-triggerman. R. 178, 489, 694, 962, 1197, 1730, 1848, 2223, 2231, 2403, 2446.

(c) Seven prospective jurors were excused — four for cause and three by agreement of counsel — on the basis of general statements of opposition to capital punishment. R. 484, 1170, 1367, 1687, 1802, 1956, 2143. None of these veniremen was instructed regarding Texas capital sentencing procedures or regarding the duty of a juror to set aside personal reservations and follow the law; and in none of these cases was it "unmistakably clear" that the venireman could not subordinate his sentiments against the death penalty to his duty to render responsible jury service and follow the court's instructions on the law.

(d) An additional prospective juror was excused for cause after stating that although ". . . in certain cases . . . [he] would be for it and give the death penalty", R.

2202, and would "consider" and "conditionally could impose the death penalty for a principal to murder," *ibid*, and that he thought capital punishment was a deterrent, R. 2206-07, his serious moral reservations about the death penalty made him disinclined to serve and led him to believe that he could not be "a competent juror," R. 2210.

(e) At the time of petitioner's trial, former Article 1257(d) of the Texas Penal Code sanctioned the exclusion for cause of prospective jurors in capital cases who were unable to swear that "the mandatory penalty of death or imprisonment for life . . . [would] not affect . . . their deliberations on any issue of fact."

(f) Fifteen prospective jurors in petitioner's case, some of whom were in favor of capital punishment and others of whom were not, were excused for their inability to take the Article 1257 (d) oath. R. 489, 1848, 2403, 2446, 377, 1165, 1308, 1425, 1802, 1839, 1874, 1913, 2226, 2235, 2416, 2498, 2499, 2502.

(g) Two prospective jurors who believed in the death penalty and thought themselves able to impose it were excused for cause after indicating that, in a capital case, they would require proof by a higher standard than what they understood the words "beyond a reasonable doubt" to imply. R. 684, 2429.

(2) **Petitioner was denied trial by a jury that was a representative cross section of the community, as required by the Sixth and Fourteenth Amendments to the Constitution of the United States.**

(a) Petitioner realleges paragraphs 12(E)(1)(a)-(g), above.

(b) The jury selected through the procedures just described was not a representative cross section of the community.

(3) **Petitioner was denied trial by a jury that was impartial and was not biased in favor of the prosecution, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.**

(a) Petitioner realleges paragraphs 12(E)(1)(a)-(g)

and (2)(b) above.

(b) Jurors without scruples against imposition of the death penalty tend to be biased in favor of the State in determining issues of fact.

(c) Jurors capable of deciding capital cases without being "affected" in their deliberations by the mandatory punishments of life imprisonment or death tend to be biased in favor of the State in determining issues of fact.

(d) Jurors capable of returning a verdict which they know will result in a sentence of death even in cases in which their personal choice of sentence would be life imprisonment or some lesser sentence tend to be biased in favor of the State in determining issues of fact.

(e) Jurors without scruples against imposition of the death penalty in the case of a non-triggerman tend to be biased in favor of the State in determining issues of fact.

(f) Jurors capable of deciding a capital case involving a non-triggerman without being "affected" in their deliberations by the mandatory punishments of life imprisonment or death tend to be biased in favor of the State in determining issues of fact.

(g) Jurors capable of returning a verdict which they know will result in a sentence of death in the case of a non-triggerman, even though their personal choice of sentence would be life imprisonment or some lesser punishment, tend to be biased in favor of the State in determining issues of fact.

(h) As a result of its selection through the procedures described above, the jury which convicted and sentenced petitioner was conviction-prone and incapable of rendering a fair and impartial verdict.

(4) Petition was denied trial by a jury that reflected contemporary standards of decency in the assessment of the penalty of death, as required by the Eight and Fourteenth Amendments to the Constitution of the United States.

(a) Petitioner realleges paragraphs 12(E)(1)(a)-(g) and (2)(b), above.

(b) Of the jurors who were sworn to try petitioner's

case, eleven said that they were generally in favor of the death penalty. R. 440, 585, 964, 1021-1022, 1316, 1526, 1988, 2121, 2347, 2452, 2530. Only three expressed reservations about it. R. 298, 1505, 2448. Three said that they believed that most, but not all, people convicted of capital crimes should receive death sentences. R. 985, 2478, 2551. Only one indicated that she thought the penalty appropriate in few capital cases. Seven indicated that their belief in the death penalty was longstanding. R. 440, 594, 966, 1022, 1316, 2369, 2530. Eight indicated that they believed in the death penalty for principals, R. 585-586; 965-966; 1027-1028; 1329, 1338, 1526; 2349; 2453; 2461; 1992; 1995, and a ninth juror said he had "no feeling" in that regard "other than to follow the letter of the law," R. 2533. The remaining three indicated that they were able to follow the law of principals, R. 310, 446-447, 2136, and able to answer the sentencing questions in a manner that would result in a death sentence for a principal, R. 315, 450, 2125. All who were asked stated that, in a capital murder case, they would not require proof of motive, R. 590, 976, 1043, 1345, or premeditation, R. 977, 1345; that they believed the death penalty appropriate even though there had been only one victim, R. 441, 586, 2122, 2348; and that they would not be led by the seriousness of the penalty to hold the State to a higher standard than proof beyond a reasonable doubt, R. 593, 978, 1025, 1346, 1520. All who were asked said they were able to take an oath that the mandatory penalties would not affect their deliberations on any issue of fact, T. 301, 588-589, 976, 1039-1040, 1342, 2137, 2357. And all who were asked said that if, after hearing the evidence, they became personally convinced that the defendant deserved a lesser penalty than death or life imprisonment, they could set aside that personal feeling in determining the case. R. 1026, 1039; 1509, 1518, 1523; 2127, 2136; 2004; 2454.

(c) Under Texas law, aberrant, disproportionately severe death sentences are uncorrectable by any authority save the standardless authority of the executive to grant clemency.

F. A Hearing Should Be Held To Determine Whether Petitioner's Trial Attorney Failed To Render Adequate And Effective Assistance Of Counsel.

(1) Petitioner realleges paragraph 12(E), above.

(2) Petitioner's counsel agreed or failed to object to the dismissal of death-scrupled veniremen at petitioner's trial.

(3) Petitioner's trial attorney would have a conflict of interest in alleging that he failed to render adequate and effective assistance of counsel.

(4) Petitioner should have other counsel assigned to represent him at a hearing to determine whether his trial attorney failed to render adequate and effective assistance of counsel.

13. Each of the grounds listed in paragraph 12 have been previously presented to the Texas courts, and each has been denied without a hearing.

14. There are no petitions or appeals presently pending in any state or federal court relating to the judgment under attack.

15. Ernest Benjamin Smith was represented by the following court-appointed counsel at trial and sentencing: Howard Wilson and John F. Simmons, 520 Adolphus Tower Building, Dallas, Texas, 75207.

On his appeal to the Texas Court of Criminal Appeals, Ernest Benjamin Smith was represented by John F. Simmons.

On his petition for a writ of certiorari in the United States Supreme Court, Ernest Benjamin Smith represented by John F. Simmons and by Jack Greenberg, James M. Nabrit III, Peggy C. Davis, Linda S. Greene and David E. Kendall, all at 10 Columbus Circle, New York, New York 10019, and Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305. In his state habeas corpus proceedings Ernest Benjamin Smith was represented by John F. Simmons and by Jack Greenberg, James M. Nabrit III, Peggy C. Davis, Joel Berger, Linda S. Greene and David E. Kendall, all at 10 Columbus Circle, New York, New York

10019, and Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305.

16. Ernest Benjamin Smith was not sentenced to more than one count of an indictment, or on more than one indictment in the same court and at the same time.

17. Ernest Benjamin Smith has no other sentence to serve in the State of Texas than the sentence which is challenged herein.

WHEREFORE, Petitioner prays that this Court:

1. Issues a writ of haveas corpus to have petitioner brought before it to the end that he may be discharged from his illegal confinement and restraint and/or relieved of his sentence of death;

2. Conduct a hearing at which proof may be offered concerning the allegations of this petition;

3. Permit petitioner, who is indigent, to proceed without prepayment of costs or fees;

4. Grant petitioner, who is indigent, sufficient funds to secure expert testimony necessary to prove the facts as alleged in this petition;

5. Grant petitioner the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts alleged in this petition.

6. Appoint an attorney to represent petitioner on the question of inadequate and ineffective assistance of counsel, as set forth in paragraph 12(F), above.

7. Allow petitioner a period of sixty days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

8. Stay petitioner's execution pending final disposition of this petition; and

9. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/ John F. Simmons
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ATTORNEYS FOR PETITIONER

Dated: April 21, 1977

Supreme Court, U. S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

VOLUME II

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

No. 79-1127

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

PETITION FOR CERTIORARI FILED
JANUARY 21, 1980
CERTIORARI GRANTED
MARCH 17, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	§	NO. CA3-77-0544
	§	
AND	§	
	§	
ELLIS UNIT, TEXAS DEPARTMENT OF CORRECTIONS	§	

ORDER - Filed April 22, 1977

The Petitioner, Ernest Benjamin Smith, is scheduled to be executed by electrocution by the respondent State of Texas on April 26, 1977. The Court has been presented with a motion to stay that execution pending a hearing on issues concerning the alleged unconstitutionality of petitioner's conviction and sentence.

For reasons hereinafter specified the motion for a stay is GRANTED pending further order of this Court.

The clerk of this Court is ordered to give immediate telephonic and telegraphic notice of this order staying Petitioner's execution to the following state officers:

(1) W. J. Estelle, Director of the Texas Department of Corrections;
(2) Robert Cousins, Warden Ellis Unit, Texas Department of Corrections;
(3) Eli Rushing, Assistant Warden Ellis Unit, Texas Department of Corrections;
(4) John L. Hill, Attorney General, State of Texas;
(5) Honorable Dolph Briscoe, Governor State of Texas; and,

(6) Paul Cromwell, Chairman Texas Board of Pardons and Paroles.

The clerk shall further cause a certified copy of this order to be served upon the above named individuals as soon as practicable. The clerk is further ordered to notify the Court in writing as to the exact time that the above named individuals have been contacted by telephone.

The stay is being granted incident to a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1970). The petition raises substantial questions concerning the constitutionality of the petitioner's conviction and sentence. Foremost among these concerns is the ability of the petitioner to present "mitigating circumstances" to the jury at the sentencing stage of the trial. Equally serious considerations are raised by the state's evidence of "aggravating circumstances" presented to the jury at the sentencing stage.

The Texas death penalty statute — Article 1257, V.A.P.C. and Article 37.071 V.A.C.C.P. — was held constitutional by the United States Supreme Court based on the finding that the jury may be permitted to consider mitigating factors. And "a jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas*, 49 L.Ed.2d 929, 938 (1976).

It is unclear at this stage whether the jury was properly presented with these mitigating factors. If the procedure for submitting these factors to the jury was unfair the death penalty imposed in this case is unconstitutional. As the Supreme Court has recently ruled a statute imposing the death penalty that is fair on its face may be applied in an unconstitutional manner. *Gardner v. Florida*, 45 U.S.L.W. 4275 (March 22, 1977).

Finally, the peculiar factual circumstances of this case raise serious questions concerning the death penalty imposed on petitioner. This concern stems from the fact that the murder upon which this conviction and death sentence is based was committed not by petitioner but

by one Howie Ray Robinson. The Texas Court of Criminal Appeals on April 20, 1977 overturned Robinson's state conviction. While this fact may not ultimately bear on the constitutional issues raised in this petition for habeas corpus the petitioner should at least be given the opportunity to explore the legal questions raised by the reversal of Robinson's conviction. Because of the short time span between the Court of Criminal Appeals reversal in *Robinson* and the scheduled date of execution that opportunity has not afforded itself.

Certain procedural matters must be ruled upon before a date for an evidentiary hearing on the petition for a writ of habeas corpus may be set by the court. Accordingly, a hearing to consider these procedural matters has been set for April 29, 1977, at 9:00 a.m.

It is so ORDERED.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

Date April 22, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, JR.	§	
DIRECTOR, TEXAS	§	
DEPARTMENT OF	§	No. CA 3-77-0544
CORRECTIONS, WARDEN	§	
ELLIS UNIT,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS	§	

ORDER - Filed April 29, 1977

The Court has raised several procedural matters with respect to the petition for writ of habeas corpus in the instant case. It is therefore ORDERED that:

(1) Attorney for Petitioner shall cause the summons and petition in this case to be served on the assistant Attorney General for the State of Texas, Walter C. Prentice, not later than 5:00 P.M., April 29, 1977. The marshal's fee for service shall be waived pending a determination of petitioner's status as a pauper.

(2) The state shall file an answer with the clerk of this court not later than May 20, 1977. The answer shall be in compliance with Rule 5 of the United States Rules for Habeas Corpus proceedings. 28 U.S.C. foll. §2254.

(3) The state shall file with the clerk of this court not later than May 20, 1977, the entire transcript from petitioner's state proceedings. If all or any part of this transcript is unavailable the court shall be notified as soon as practicable.

(4) The petitioner shall file with the clerk of this court not later than May 20, 1977 a report detailing with specificity the factual disputes in this case. 28 U.S.C. §2254(d). After this factual report is received the court will promptly determine whether an evidentiary hearing

is required.

(5) The petitioner, if he so desires, shall file a pauper's oath with the clerk of this court as soon as practicable. *Adkins v. E. I. duPont de Nemours & Co.*, 335 U.S. 331 (1948).

(6) If a pauper's oath is filed and the court allows in forma pauperis status, a list of expert witnesses the petitioner wishes to employ should be presented to the court for approval as soon as practicable.

It is so ORDERED.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

DATE April 29, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH, Petitioner	§ §	
V.	§ § §	CIVIL ACTION NO. CA3-77-0544-F
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent	§ § § § §	

MOTION TO DISMISS AND ANSWER -
Filed May 23, 1977

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent herein, and by and through his attorney of record, the Attorney General of Texas, files this Motion to Dismiss and Answer and would show the court as follows:

I.

Respondent has lawful custody of Petitioner pursuant to an indictment, judgment and sentence in Cause No. C-73-12659-IN of the 195th Judicial District Court of Dallas County, Texas. Copies of the indictment, judgment and sentence are attached hereto and made a part hereof.

Petitioner was indicted by the Grand Jury of Dallas County, Texas, for the capital murder of William Moon, alleged to have occurred on or about September 28, 1973.

The evidence showed that during the early morning hours of September 28, 1973, Petitioner, along with Howie Ray Robinson, entered a Sheppes Grocery Store in Dallas County, Texas. (R. 2671). Petitioner and Robinson entered the store, while George Holden waited out-

side in his car. (R. 2736). Both Petitioner and Robinson were carrying firearms. (R. 2737, 2738). Robinson placed a package of lunch meat and a jar of mustard on the counter while Petitioner held a gun on the cashier, William Moon, and said, "This is a holdup." (R. 2738). Moon apparently made a motion to reach for something, possibly his wallet (R. 2632, 2738). Petitioner attempted to shoot Moon but his gun misfired. (R. 2632, 2738). He shouted to Robinson either, "Get him Howie" (Petitioner's oral confession) (R. 2632) or, "Look out Howie" (Petitioner's trial testimony) (R. 2738). Robinson fatally shot the cashier. They took the money from the register at the store and a gun from underneath the counter and went to the home of James Mitchell where the proceeds of the robbery were divided.

The Texas Court of Criminal Appeals affirmed the conviction on February 18, 1976. Rehearing was denied by written opinion on July 14, 1976. Leave to File a Second Motion for Rehearing was denied on October 6, 1976. The mandate to the lower court was issued on October 8, 1976. Petitioner was formally sentenced to death on October 20, 1976, by the trial court. His execution date was set for November 22, 1976. A stay of execution pending timely filing of petition for writ of certiorari was granted by Mr. Justice Powell on November 6, 1976. On March 5, 1977, the Supreme Court of the United States denied the Petition for Writ of Certiorari. *Smith v. Texas*, 97 S.Ct. 1341 (1977). On March 22, 1977, Petitioner was again formally sentenced and the execution date set for April 26, 1977. On April 18, 1977, Petitioner presented a Writ of Habeas Corpus to the trial court. On April 20, 1977, Petitioner presented an Application for Stay of Execution to the Texas Court of Criminal Appeals. It was considered as an Original Writ of Habeas Corpus and denied in a written opinion on April 20, 1977.

Although Petitioner has not strictly complied with the provisions of Art. 11.07, Texas Code of Criminal Procedure, Respondent, in the interest of justice, does not contend that he has failed to exhaust state remedies.

Further, at this time, Respondent makes no contention that there has been an abuse of the writ.[1]

Jurisdiction appears to be proper under the provisions of 28 U.S.C. §2254.

II.

A.

Petitioner's Contention That His Death Sentence Constitutes Cruel And Unusual Punishment Is Without Merit.

Petitioner in eleven (11) numbered sections contends that his death sentence constitutes cruel and unusual punishment. The great portion of this contention consists of social arguments unsupported by facts or law in support of abolition of the death penalty.

As to Petitioner's sentence itself, this contention has been presented to both the Texas Court of Criminal Appeals, *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976), and the Supreme Court of the United States, *Smith v. Texas*, 97 S.Ct. 1341 (1977). It was rejected by both courts.

In upholding the Texas capital murder statute, the Supreme Court stated:

> "In the only other case in which the Texas Court of Criminal Appeals has upheld a death sentence, it focused on the question of whether any mitigating factors were present in the case. See *Smith v. State*, No. 49,809 (Feb. 18, 1976). In that case the state appellate court examined the sufficiency of the evidence to see if a 'yes' answer to question 2 should be sustained. In doing so it examined the defendant's prior conviction on narcotics charges, his subsequent failure to attempt to rehabilitate himself or obtain employment, the fact that he had not acted under duress or as a result of mental or emotional

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[1] *See*, Rule 9, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (effective February 1, 1977).

pressure, his apparent willingness to kill, his lack of remorse after the killing, and the conclusion of a psychiatrist that he had a sociopathic personality and that his patterns of conduct would be the same in the future as they had been in the past.

"Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objection consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Jurek v. Texas*, 428 U.S. 262 at 273.

The specific aggravating factors as to the offense were:

1. Murder - it is undisputed that the death of William Moon resulted from gunshots fired during the robbery.
2. Committed during the course of a robbery - it is undisputed that Petitioner was an active and knowing participant in the robbery.
3. Petitioner committed an act clearly dangerous to human life - it is a well established principle of law that the carrying of a deadly weapon supplies intent in murder or assault. Also Petitioner was aware that Robinson was carrying a deadly weapon and that there was a reasonable expectation that the course of conduct they embarked upon would result in the death of someone.

The specific aggravating factors for sentencing included the facts of the offense and the additional aggravating factors as outlined in the *Jurek* opinion of the Supreme Court of the United States.

Petitioner testified that he was a knowing and active participant in the robbery. He took the gun with him by

instinct. (R. 2786). The only defect in the gun was a broken clip, and he testified that it could be loaded manually, and further, that he knew how to load it manually. (R. 2750). His testimony that he did not own a gun (R. 2732) and that the gun he used in the instant offense was only in his possession for three days was severely impeached. His own witness testified that Petitioner took the gun at least three weeks prior to the offense (R. 2772) and that he had not seen Petitioner or the gun since. (R. 2773). Petitioner was also seen displaying a pistol in commercial establishments on two other occasions. (R. 2834, 2838).

The Petitioner had the opportunity to present mitigating evidence in his behalf. He testified that he had served with the military in Viet Nam and received an Honorable Discharge. (R. 2726). His step-mother testified that he went to school, went into the service, got an Honorable Discharge, and was married. (R. 2919). His aunt also testified to this. (R. 2921-2923). This meager evidence was far outweighed by the aggravating factors. Petitioner did not take the stand during the punishment trial to express any remorse. Had any psychiatric testimony favorable to him existed, he could have presented it for the jury's consideration. *See, Eddie Robinson v. State*, 548 S.W.2d 63 (Tex.Crim.App. 1977). There was no evidence that any extenuating pressures forced Petitioner's participation in the crime.

Further support for the proposition that punishment statutes calling for the prediction of future behavior are constitutional is the Federal Dangerous Special Offender Statute, 18 U.S.C. §3575, *et seq. See, United States v. Stewart*, 531 F.2d 326 (6th Cir. 1976), *cert. denied*, 96 S.Ct. 2629 (1976).

As to the portion of this allegation contending electrocution is an unnecessary, cruel means of execution, the Governor of the State of Texas signed House Bill 945 on May 4, 1977, providing for executions to be conducted by a lethal drug injection.

All of the other contentions of Petitioner as to cruel and unusual punishment have been rejected by *Gregg v.*

Georgia, 428 U.S. 153 (1966); *Proffitt v. Florida*, 428 U.S. 242; and *Jurek v. Texas, supra.* The people, acting through the Legislatures of several states, have chosen to provide for a death penalty. While Petitioner could cite authority for the social standards arguments he presents, equal authority exists for the proposition that the death penalty serves the legitimate interest of deterrence, retribution, incapacitation, and normative validation.[2]

Petitioner has wholly failed to state any facts which would require an evidentiary hearing or entitle him to relief. Therefore, the Motion to Dismiss should be granted.

B.

The Use Of Psychiatric Testimony Did Not Violate Petitioner's Fifth and Sixth Amendment Rights.

Petitioner contends that his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were violated by the use of the psychiatric evaluation performed prior to trial.

An eminently qualified psychiatrist testified as to the result of his examination. This mental status examination consisted of five sections. They were (1) general appearance and behavior; (2) production of thoughts; (3) affect or mood; (4) content of thought; and (5) sensorium. (R. 2937-2940). The statements made by Petitioner to the psychiatrist concerning the crime itself were elicited by Petitioner on cross-examination of the psychiatrist. (R. 2950). This medical testimony was presented after Petitioner had been found guilty.

Texas Code of Criminal Procedure, Art. 37.071, V.T.C.A. (1965), authorizes the presentation of evidence relevant to sentence. Psychiatric testimony favorable to

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[2] *See,* Ehrlich, *The Deterent Effect of Capital Punishment; A Question of Life and Death*, 65 Am.Econ.Rev. 397 (1975), which sets forth the conclusion that every execution deters approximately eight murders.

a defendant has been held admissible. *Robinson v. State, supra.*

The Fifth Amendment privilege against self-incrimination should not protect a defendant from disclosure of his mental status anymore than it protects a defendant from disclosure of his physical status. He may be compelled to give a blood test, fingerprints, or speak for a voice identification. *Schmerber v. California*, 384 U.S. 757 (1966).

It is difficult to perceive a violation of Fifth Amendment rights when such testimony is only to the evaluation of mental condition and is admitted only after a finding of guilt.

As to any Sixth Amendment right to have counsel present during the examination, it must be remembered that the examination is not an adversary or excusatory procedure. It is merely a physician's examination of the health of a defendant. There is no constitutional right to have a lawyer present during a physician's examination. Counsel for Petitioner was supplied with a report by this physician and was aware of the result of the examination.

No constitutional question has been raised by the admission of the results of the physician's examination during the punishment phase of the trial.

C.

Petitioner Was Not Denied Due Process By The Reference To His Having Carried A Pistol And His Nickname.

Petitioner contends he was denied due process by the introduction of evidence that he had possessed a pistol at times precedent and subsequent to the instant offense. He further contends that the use of this testimony was for the purpose of leading the jury to believe the Petitioner had committed other armed robberies. Such was not the case.

During the trial, the Petitioner testified that he had possessed the pistol used in the robbery for only three days and that a friend had brought it to him for repair.

(R. 2732). He further stated that he had never owned a pistol. (R. 2732).

After Petitioner rested, the State presented specific rebuttal evidence in response to Petitioner's testimony. Yolanda Lewis testified, out of the presence of the jury, that she had seen Petitioner carrying a pistol at Lowe's Bar-B-Q in Dallas, Texas, on September 29, 1973. (R. 2802-2805). This testimony was then presented to the jury. (R. 2836-2839). Martha White testified, out of the presence of the jury, that she had seen Petitioner carrying a pistol at Stop And Go in Dallas, Texas, on a Saturday during the first week of September, 1973. (R. 2829-2932). This testimony was also presented to the jury. (R. 2833-2836).

The references to Petitioner having carried a pistol similar to the one he carried in the instant offense, in public places at other times, were relevant to the issue of intent and were admissible for the purpose of impeaching Petitioner's testimony. They were clearly admissible under Texas law. *See, Spencer v. Texas*, 385 U.S. 564 (1967).

The reference to the nickname of "Dirty Red" was made in connection with the identification of Petitioner. That was the name by which some of the witnesses knew him, rather than the name of Ernest Benjamin Smith. (R. 2808-2809). Petitioner's own counsel referred to him as "Red" during cross-examination. (R. 2816).

These references did not prejudice Petitioner or deny him due process, especially in light of his own testimony of the brutal facts of the offense. This same contention has been presented to the Texas Court of Criminal Appeals where it was found to be without merit, and was further presented to the Supreme Court of the United States, in Petitioner's denied Petitioner for Writ of Certiorari.

D.

Petitioner's Oral Statement Which Led To The Gun Taken In The Robbery Was Admissible.

At the time Petitioner gave his oral confession, he had

been fully warned of his rights, both by a magistrate and the police officer to whom he made the confession. (R. 2645-2647, 2665-2666). Petitioner agreed in writing to the interview. (R. 2644). He did not exercise his right to remain silent. (R. 2665-2666). Petitioner's allegations in paragraph 8 of this section are untrue and not in the Record. The gun was known to belong to George Wheeler and was referred to as such. As a result of Petitioner's confession, Officer Lewis learned to whom Petitioner had sold the gun and was able to recover it.

An oral confession which leads to the discovery of evidence is admissible under Texas law. *McGlivery v. State*, 533 S.W.2d 24 (1976).

Having been fully warned of his rights and waiving them, Petitioner has no standing to complain of the admission of his confession.

E.

The Jury Was Qualified In Accordance With The Standards Set Forth In *Witherspoon v. Illinois*.

Petitioner sets forth several members of the venire he feels were improperly excused from the panel in violation of his constitutional rights as set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The jurors impermissibly excused in *Witherspoon* were summarily dismissed. A reading of the trial transcript in Petitioner's case affirmatively demonstrates that the challenged jurors were not summarily dismissed. Attorneys for Petitioner were given the opportunity to further question each and every challenged juror and did, in fact, avail themselves of such opportunity. Such was not the case in *Davis v. Georgia*, ____U.S.____, 97 S.Ct. 399 (1976), *Boulden v. Holman*, 394 U.S. 478 (1969), or *Maxwell v. Bishop*, 398 U.S. 262 (1970), all relied upon by Petitioner.

Not all of the excused jurors now complained of were challenged for opposition to the death penalty.[3] Several

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[3] Tommy F. Harrell wanted proof beyond any doubt as to guilt. (R.

of the prospective jurors answered that the knowledge that the ultimate sentence would be life imprisonment or death would affect their answers to questions of fact.[4] Others were excused by agreement for various reasons.[5] Finally, there were those prospective jurors who could not give the death penalty no matter what evidence was presented.[6]

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684); C. L. Christopher stated in response to defense questions that the possibility of parole would affect his deliberations on fact questions. (R. 1163-1166); Joe R. Duran wanted proof beyond any doubt on guilt. (R. 2429).

[4] Elodia Martinez could not find a person guilty knowing the possible punishment. (R. 178); Patricia D. Langham stated the punishment range would affect her determination of guilt (R. 489); Charles A. Nethery could not find a defendant guilty of capital murder (R. 694); Donald A. Kegley could not find a defendant guilty (R. 962); Kenneth Bishop stated the death penalty would affect fact determination (R. 1314); Janice Neal stated her answers would be affected by the possible penalty (R. 1425); Jerry Wayne Halpin could not find a principal guilty (R. 1730); Calvin M. Dennis could not convict (R. 1802); William M. Chitty stated the fact that he did not believe in the death penalty would affect his deliberations on fact questions (R. 1839); Gladys N. Hansen stated the possible punishment would affect her decision on guilt (R. 1848); Zena B. Bradshaw stated her answers would be affected by life or death (R. 1874); L. G. Smith could not find a principal guilty of capital murder (R. 2085); Edgar Dunn stated his feelings against the death penalty would affect his deliberations (R. 2235); Helen R. Coleman could not find a defendant guilty of capital murder (R. 2416); Jeanette Baldwin stated the penalty of life or death would affect her findings of fact (R. 2445-2446); Gary Lee Nelies could not take an oath that he would be unaffected as to any fact question knowing the possible punishment (R. 2497); Mrs. Ollie M. Arthur stated she could not take the oath (R. 2590); Robert L. Johnson stated he could not take the oath (R. 2409); C. W. Jones stated the death penalty would affect his deliberations on fact questions (R. 1804).

[5] Mary J. Page (R. 377); Robert M. Hill (R. 1107); Beverly H. Rands (R. 1137); Jerry L. Williams (R. 2231).

[6] Stanley T. Tanner opposed the death penalty under any circumstances (R. 848); Laura Nicholas believed everyone has a right to

The Supreme Court stated in *Witherspoon v. Illinois, supra, footnote 21*, that:

> "... [N]othing we say today bears upon the power of a State to execute a defendant sentence to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) that they could automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case."

All of the prospective jurors in question were properly excluded. The oath required by Art. 1257, Texas Penal Code, was in part a codification of the *Witherspoon* doctrine. For the state to allow a person to serve on a capital jury knowing that he would ever answer fact questions in a manner to coincide with his personal beliefs or prejudices, either for or against the death penalty, would be to sanction trial by prejudice, rather than trial by evidence.

The Texas Court of Criminal Appeals found that all of the prospective jurors, with the exception of veniremen Baker and Switch, were tested in accordance with the terms of Art. 1257, Texas Penal Code. *See, Smith v. State, supra*, at 698. They were both excused, with the consent of the Petitioner's counsel, after stating they

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live no matter what he has done (R. 1337); Grisley Baker felt his religion would prevent him from serving in a capital case (R. 1691); Gary L. Barclay could not, under any circumstances, give the death penalty to a principal (R. 1912); Melpherd D. Switch could not condemn anyone to death (R. 1957); Elijah R. Robinson, Jr. opposed the death penalty under any circumstances (R. 2226); Johnnie Mae Sanders was unequivocally opposed to the death penalty (R. 2592); Jimmy S. Christian could not vote for the death penalty under any circumstances (R. 2145).

could not give the death penalty.[7] This portion of the voir dire examination of Petitioner's case bears no kindredship to the examination of venireman Lamb in *Davis v. State*, ____ Ga. ____, 225 S.E.2d 241, 243 (Ga.), *rev'd*, ____U.S.____, 97 S.Ct. 339 (1976), which the Georgia Supreme Court found violative of *Witherspoon*. Unlike the Georgia Supreme Court, the Texas appellate court made a careful determination that *Witherspoon* had been followed.

There was no error in the jury selection procedure employed during Petitioner's trial.

F.
Petitioner Received Effective Assistance Of Counsel.

The trial record amply demonstrates that Petitioner received the effective assistance of counsel. No germane fact of that record is alleged which demonstrates that counsel's trial performance denied Petitioner his Sixth and Fourteenth Amendment rights. The fact that counsel may have not objected to the excusal of certain prospective jurors is of little importance when it is clear

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[7] Baker testified as follows:

Q. . . . Are you saying your religion would prevent you from personally being on a death case?

A. Yeah.

THE COURT: Any Objections?

MR. SIMMONS: I have no objections.

(R. 1691)

* * *

Switch testified as follows:

A. Well, sir, I work in a hospital. This is my profession, and therefore, in my belief, I'm not able to prejudge anybody. Death is something I would not be able to condemn anybody to. This is what I believe and therefore—

Q. Because of your profession?

A. Yes.

Q. And because of the—

MR. SIMMONS: We have no objection to him being excused, if the State—

(R. 1957)

from the record that such objection would not have been sustained. There was no prospective juror who was improperly excused.

A defendant is not entitled to perfect counsel, but rather "reasonably effective assistance" of counsel. *Herring v. Estelle*, 491 F.2d 125 (6th Cir. 1975). As set forth in *McKenna v. Ellis*, 280 F.2d 592, 599 (6th Cir. 1960), effective counsel is:

> ". . . not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

Counsel for Petitioner filed numerous pre-trial motions, including a Motion for Severance (R. 10), Motion for Discovery (R. 12), Motion for Production of Witness Statements (R. 16), Motion to Sequester Jury (R. 19), Motion to List State Witnesses (R. 21), Motions in Limine (R. 26, 29, 31, 33, 41, 64), Motion to Suppress (R. 67), Motion to Eliminate Consideration of Death Penalty (R. 69). Counsel for Petitioner also requested Special Instructions (R. 93-103), made Objections to the Court's Charge (R. 105), made a Motion for New Trial (R. 125), gave Notice of Appeal, presented a Brief to the Texas Court of Criminal Appeals, and presented oral argument on behalf of Petitioner. During the trial itself, counsel made numerous objections and conducted a vigorous cross-examination of prosecution witnesses. In viewing the Record as a whole, there is no evidence of ineffective assistance of counsel.

III.

Respondent denies each and every allegation of fact made by the Petitioner except those specifically admitted herein or those supported by the Record. Petitioner has not set forth any facts which would show that he is entitled to relief or an evidentiary hearing.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Re-

spondent prays that this Motion to Dismiss be granted, or in the alternative, that after final hearing, relief be in all things denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

/s/ Anita Ashton
ANITA ASHTON
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
Telephone: (512) 475-3281

Attorneys for Respondent

Letter From Counsel for Petitioner To United States District Court

August 25, 1977

Hon. Robert W. Porter
Northern District of Texas
1100 Commerce Street
Dallas, Texas 75202

Re: *Smith* v. *Estelle*
Civil Action No. CA3-77-0599-F

Your Honor:

This letter is submitted in response to the Court's order in the above-titled case requiring petitioner to delineate which issues involve factual disputes and which may be decided without the need for an evidentiary hearing.

The main thrust of the petition, contained in Paragraph 12(A), is that the Texas death penalty statute is unconstitutional as applied. Proof on this issue would entail a substantial evidentiary hearing, including testimony as to the latest scientific evidence on the issue of deterrence and statistical evidence as to the race and economic status of those who are sentenced to die in Texas as opposed to those who commit potentially capital offenses but are not sentenced to die. The hearing would also involve testimony by psychiatrists, including representatives of the American Psychiatric Association, questioning the reliability of the testimony of Dr. Grigson introduced by the State as proof of aggravating circumstances. In addition, petitioner's allegation in paragraph 12E(3) as to the conviction-proneness of the jury at his trial requires testimony from several social scientists who have conducted extensive studies of the attitudes of jurors favoring capital punishment. Finally, petitioner's allegation in paragraph 12D concerning the inadmissibility of the oral statement given to a police officer by petitioner raises a factual question for resolution at a hearing.

Nonetheless, petitioner believes that there are several significant issues in this case which can be decided in his

favor on the basis of a motion for summary judgment, without the need for a hearing:

1) Paragraph 12E of the petition includes allegations that persons with conscientious scruples against the death peanlty were improperly excluded from the jury, in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). This is purely an issue of law which can be briefed and decided on papers.

2) Paragraph 12C alleges that the prosecuting attorney made persistent, immaterial, improper references to and suggestions of unrelated criminal activity by petitioner, at both the guilt and sentencing phases of petitioner's trial. These statements of the prosecuting attorney are all recorded in the transcript of the trial, and there is no factual dispute that they were uttered. Accordingly, this issue can be decided without an evidentiary hearing.

3) Paragraph 12B of the petition includes an allegation that the introduction of Dr. Grigson's testimony at trial violated petitioner's privilege against self-incrimination and his right to counsel. Respondent's Answer, pp. 6-7, does not dispute that 1) permission of petitioner's counsel was not obtained prior to Dr. Grigson's interview of petitioner; 2) petitioner's counsel was not notified of the interview; and 3) petitioner was not warned that a) his statements to Dr. Grigson could be used against him at trial, b) he had the right to have counsel present and/or to consult with counsel during the interview, c) he had a right to remain silent and d) he had a right to terminate the interview at any time. Also, the trial transcript reflects that Dr. Grigson testified not only as to petitioner's mental state but as to statements by petitioner about facts of the crime itself [see paragraph 12(B)(13)]. These facts raise clear questions of constitutional law under the Fifth and Sixth Amendments.

4) Paragraphs 12(A)(2) and (3) raise a substantial legal question concerning limitations on petitioner's ability to present evidence of mitigating circumstances at the penalty trial, because his case was tried prior to the holding

of the Texas Court of Criminal Appeals that a broad range of mitigating factors were admissible under the Texas death penalty statute. *Jurek* v. *State*, 522 S.W.2d 934, 939-40 (Tex.Cr.App. 1975). As there can be no dispute that petitioner was tried prior to the *Jurek* decision, this issue also can be decided in his favor without an evidentiary hearing.

5) Finally, petitioner alleges in paragraphs 12(A)(1) and (5) that the death penalty is disproportionately severe and therefore excessive in the case of an offender who did not himself take human life. While the petition contains many factual allegations on this issue concerning, e.g., public attitudes towards use of the death penalty for non-triggermen, the extremely rare use of the death penalty in such cases, and the lack of deterrent effect of this application of the death penalty, we believe that the issue can and should be decided in petitioner's favor as a matter of law. Indeed, the Supreme Court of the United States has granted certiorari in an Ohio case presenting just such an issue of law, and will have the question before it this Term. *Bell* v. *Ohio*, No. 76-6513 (certiorari granted June 27, 1977). Enclosed for this Court's interest is a xerox copy of the Brief for Petitioner in *Bell*, setting forth (in Point I(c) and Appendix A) the legal arguments now before the Court on the non-triggerman issue. (The brief is presently being printed, and a printed copy will be submitted to Your Honor as soon as it is received.)

Respectfully yours,
/s/ Joel Berger
JOEL BERGER

JB/mi
Enc.
cc: Hon. John L. Hill
John Simmons, Esq.
Anthony G. Amsterdam, Esq.

United States District Court
Northern District of Dallas
Dallas, Texas 75242
October 6, 1977
Robert W. Porter
U. S. District Judge

Mr. John F. Simmons
520 Adolphus Tower Bldg.
1412 Main at Akard St.
Dallas, Texas

Re: No. CA3-77-0544-F
Ernest Benjamin Smith
vs. W. J. Estelle, et al

Dear Mr. Simmons:

In reviewing the record in the above referenced case, I have determined that there are certain facts that are not of record and could be supplied by you and your co-counsel, Mr. Wilson, by affidavit.

Specifically, I would like your personal knowledge in the following areas:

(1) What procedures were used to appoint Dr. Grigson to examine Mr. Smith;

(2) Were you or Mr. Wilson notified of this appointment;

(3) Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of his competency to stand trial;

(4) To your knowledge was a written order entered by the court appointing Dr. Grigson;

(5) What was your understanding as to the purpose of Dr. Grigson's appointment;

(6) When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith;

(7) Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the Court summarizing his findings?

I would like this information filed with the Court not later than October 14, 1977 and I trust you will have less difficulty with this than you had in meeting the last

deadline set by the Court concerning the matters that required a hearing in this case.

Miss Ashton is directed by copy of this letter to prepare controverting affidavits, if she determines them appropriate and file them with the Court not later than October 21, 1977.

Yours very truly,
/s/ Robert W. Porter
Robert W. Porter

RWP:dh
cc: Miss Anita Ashton
P.O. Box 12548
Capitol Station
Austin, Texas 78711

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR.,	§	
DIRECTOR,	§	
TEXAS DEPARTMENT	§	NO. CA3-77-0544-F
OF CORRECTIONS,	§	
AND	§	
	§	
_____ WARDEN	§	
ELLIS UNIT,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS,	§	
	§	
Respondents.	§	

AFFIDAVIT IN QUESTION-AND-ANSWER FORM - Filed October 12, 1977

(1) Q. What procedures were used to appoint Dr. Grigson to examine Mr. Smith?

A. I have no idea. Probably no appointment was ever made. Most likely, either Judge Scales or Asst. D.A. Doug Mulder just told Dr. Grigson to go interview Ernest Smith.

(2) Q. Were you or Mr. Wilson notified of this appointment.

A. No. Neither of us were ever notified.

(3) Q. Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of competency to stand trial;

A. No. Neither of us did. The answer is no to both

parts of the question.

(4) Q. To your knowledge was a written order entered by the court appointing Dr. Grigson:

A. No.

(5) Q. What was your understanding as to the purpose of Dr. Grigson's appointment;

A. If there was an appointment made I was never aware of it. When I accidentally saw the letter from Dr. Grigson in the Court's file, I just presumed that Judge Scales had asked Dr. Grigson to examine Ernest Smith informally to be certain in his own mind that Ernest was competent to stand trial.

(6) Q. When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith;

A. Sometime during jury selection we discovered Dr. Grigson's letter in the file summarizing his findings.

(7) Q. Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the Court summarizing his findings?

A. No. I feel sure there was never any written report. But regardless, we were never furnished with a copy of either.

I, JOHN F. SIMMONS, do solemnly swear that the foregoing answers to the questions set out herein, are true and correct.

/s/ John F. Simmons
JOHN F. SIMMONS
ATTORNEY FOR PETITIONER

JURAT

SUBSCRIBED AND SWORN to before me by the said JOHN F. SIMMONS who appeared before me on this the _____ day of October, 1977, and after being sworn by me to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
Notary Public in and for
Dallas County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR.,	§	
DIRECTOR,	§	
TEXAS DEPARTMENT	§	NO.CA-77-0544
OF CORRECTIONS,	§	
AND	§	
	§	
_____ WARDEN	§	
ELLIS UNIT,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS,	§	
	§	
Respondents.	§	

AFFIDAVIT - Filed October 12, 1977

My name is John F. Simmons. I am a practicing attorney in Dallas County. I am and have been the Attorney for Ernest Benjamin Smith since November 5, 1973.

This Affidavit is relative to the question of Dr. James Grigson's examination of Ernest Smith and his subsequent testimony.

I have no idea what procedures were used to appoint Dr. Grigson to examine Mr. Smith.

I was unaware that Judge Scales had appointed Dr. Grigson to see my client if he did make such an appointment. Dr. Grigson never told me about it. Neither he nor the State nor the Court ever told me about it, gave me a copy of a letter or a report, or did anything to suggest Dr. Grigson had visited with my client.

To my knowledge no written order was ever made.

Some time after the beginning of jury *voir dire* exam-

ination, Mr. Wilson and I were looking through the Court's file and saw the letter to Judge Scales from Dr. Grigson dated Feb. 28, 1974, pertaining to Dr. Grigson's "Mental evaluation" of Ernest. Although I had not known of the letter or the visit before seeing the letter in the file, I attached no significance to it. From the contents of the letter I just assumed that Judge Scales wanted to be satisfied in his own mind that the defendant was competent to stand trial. He had never asked me that question but if he had I would have answered it affirmatively. Ernest had never had any mental problems and was above average intelligence in my opinion.

Neither the issue of insanity nor the question of competency to stand trial was ever mentioned during my representation of Ernest Benjamin Smith. No Motions were ever made in that regard. No prospective juror was questioned or qualified regarding same, nor did we present anything during the guilt phase that raised the issue.

Until the time that Dr. Grigson took the stand nothing had been done or said that ever gave me any reason to believe Dr. Grigson would be called to testify, or that there was anything material or relevant that he could testify to.

Neither Mr. Wilson nor myself were ever notified of this "appointment." We were not advised beforehand that the visit would be made. We were not advised afterwards that the visit had been made.

Neither Mr. Wilson nor myself were ever furnished with a copy of any report or a copy of the letter to the court summarizing Dr. Grigson's findings. I have never seen any other report than the letter.

I swear under oath that the foregoing statements in this Affidavit are true and correct.

/s/ John F. Simmons
JOHN F. SIMMONS
ATTORNEY FOR PETITIONER
ERNEST BENJAMIN SMITH

JURAT

SUBSCRIBED AND SWORN to before me by the said JOHN F. SIMMONS who appeared before me on this the 12th day of October, 1977, and after being sworn by me to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
Notary Public in and for
Dallas County, Texas

CERTIFICATE OF SERVICE

I do certify that true copies of this Affidavit, the question-and-answer form Affidavit, and the Affidavit signed by Howard G. Wilson, have all been sent this date by Registered mail, return receipt requested, to Miss Anita Ashton, Assistant Attorney General, and Hon. Henry Wade, District Atty. of Dallas County, Texas.

/s/ John F. Simmons
JOHN F. SIMMONS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, AND	§	NO. CA3-77-0544
	§	
_____ WARDEN ELLIS UNIT, TEXAS DEPARTMENT OF CORRECTIONS,	§	
	§	
Respondents.	§	

AFFIDAVIT - Filed October 12, 1977

My name is Howard G. Wilson, I graduated from the S.M.U. School of Law in 1960 and have been a practicing attorney ever since.

I do not know what procedures were used to appoint Dr. Grigson to examine Mr. Smith. I don't really think an appointment as such was ever made. Regardless neither Mr. Simmons nor myself were ever notified of any such appointment.

Neither Mr. Simmons nor myself ever gave any type notice that either Mr. Smith's sanity or his competency to stand trial would ever be an issue in the case. We never at any time even suggested that Ernest was anything other than sane and mentally competent.

To my knowledge no written Order was entered by the Court appointing Dr. Grigson. I have never seen one.

If Dr. Grigson was appointed, I have no understand-

ing as to what the purpose for it was. We had never made any suggestion of insanity and/or incompetency.

I am not sure of the exact time that I became aware Dr. Grigson had examined Mr. Smith. It was after the start of jury selection. We were reviewing the file and saw a letter from Dr. Grigson to Judge Scales. We asked Ernest about it and he said yes, that a doctor had been up to see him. He said the doctor stayed about forty minutes.

Neither of us attached any significance to the visit. From the tenor of the letter it just seemed like something for the judge's own personal information.

Neither Mr. Simmons nor myself were ever furnished with a copy of a report of any findings that Dr. Grigson made or a copy of his letter to the court.

/s/ Howard G. Wilson
HOWARD G. WILSON

JURAT

SUBSCRIBED AND SWORN TO before me by the said HOWARD G. WILSON who appeared before me on this the _____ day of October, 1977, and after being sworn by me to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
Notary Public in and for
Dallas County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH, PETITIONER	§	
VS.	§	CAUSE NO. CA3-77-0544
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., RESPONDENTS	§	

AFFIDAVIT - Filed October 21, 1977

I, the undersigned Affiant, being duly sworn, on oath make the following statement:

My name is R. T. Scales and I am the Judge of the 195th Judicial District Court of Dallas County, Texas. I was the presiding judge at the trial of The State of Texas versus Ernest Benjamin Smith in Cause Number C73-12659. Certain questions (set out below) have been given to me by the Texas Attorney General and answers have been requested. Such questions were originally submitted to the defense attorneys, John F. Simmons and Howard G. Wilson, for their response. I have read such questions and have been requested by the Texas Attorney General to provide any information regarding answers to such questions. My responses are, as follows:

(1) Q. What procedures were used to appoint Dr. Grigson to examine Mr. Smith?

A. I appointed the psychiatrist Dr. Grigson to examine the defendant Ernest Benjamin Smith. In all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial. I have done this for my benefit because I do not intend to be a participant in a case where the defendant receives the death penalty and his mental competency remains in doubt.

(2) Q. Were you or Mr. Wilson notified of his appointment?

A. As best I recall, I informed John Simmons, the attorney for the defendant, that I had appointed Dr. Grigson to examine the defendant and that a written report was to be mailed to me.

(3) Q. Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of his competency to stand trial?

A. I do not recall that such notice of insanity or incompetency was ever given by either attorney. I have examined the court records and no such written notice appears in such records.

(4) Q. To your knowledge was a written order entered by the court appointing Dr. Grigson?

A. As I recall, Dr. Grigson was appointed by oral communication. A letter of appointment was not prepared and the court records do not reflect that I entered a written order.

(5) Q. What was your understanding as to the purpose of Dr. Grigson's appointment?

A. See my answer to question No. 1.

(6) Q. When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith?

A. See my response to question No. 2.

(7) Q. Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the court summarizing his findings?

A. I received a letter, dated 23 February 1974, from Dr. Grigson which stated that he had examined the defendant on 13 February 1974. Such letter summarized Dr. Grigson's findings. Such letter was placed in the court records and was thereby made available to both the defense and the State. To my knowledge, no written report was ever prepared by Dr. Grigson.

I, the undersigned Affiant, do solemnly swear that the foregoing answers to the questions set out herein, are true and correct.

/s/ R. T. Scales
R. T. SCALES
JUDGE OF THE 195TH
JUDICIAL DISTRICT
COURT OF DALLAS
COUNTY, TEXAS

JURAT

SUBSCRIBED AND SWORN to before me by the said R. T. Scales, who appeared before me on this the 21st day of October, 1977, and after being sworn by to tell the truth, declared under oath that the matters contained herein are true and correct.

/s/
NOTARY PUBLIC IN AND FOR
DALLAS COUNTY, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Affidavit has been served on John F. Simmons, 520 Adolphus Tower Building, 1412 Main at Akard Street, Dallas, Texas, Attorney for the Petitioner, by depositing same in the United States Mail, Postage Prepaid, on this the 21st day of October, 1977.

/s/
JOHN HAGLER

Letter From Counsel for Petitioner to United States District Court

December 21, 1977

Hon. Robert Porter
United States District Judge
United States Courthouse
1100 Commerce St., Room 15-C22
Dallas, Texas 75202

Re: Ernest Benjamin Smith
Vs. W. J. Estelle,
Cause No. CA 3-77-0544-F

Dear Judge Porter,

Pursuant to my conversation with Mr. Chip Babcock of court I am furnishing herewith an Affidavit as to information requested.

By copy of this letter I am furnishing a sworn copy of the Affidavit to Miss Cathy Fry, Assistant Attorney General, by hand-carrying same to her this date.

Very truly yours,
/s/
JOHN F. SIMMONS
ATTORNEY-AT-LAW

JFS/bs
Enclosure

CC:
Miss Anita Ashton
John H. Hagler
Joel Berger, Legal Defense Fund

IN THE UNITED STATES
DISTRICT COURT FOR
THE NORTHERN DISTRICT
OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, JR.	§	NO. CA 3-0544-F
DIRECTOR, TEXAS	§	
DEPARTMENT OF	§	
CORRECTIONS,	§	
WARDEN ELLIS UNIT,	§	
TEXAS DEPARTMENT OF	§	
CORRECTIONS	§	

AFFIDAVIT - Filed December 21, 1977

I, JOHN F. SIMMONS, do solemnly swear that the foregoing facts are true and correct:

I am the Attorney for Ernest Benjamin Smith, Petitioner in the above styled and numbered cause. On April 21, 1977 I filed in this court in this cause, a Petition for Writ of Habeas Corpus on behalf of Mr. Smith.

In this petition I raised, among other points, the following issues:

"That the introduction of the testimony of (psychiatrist) Dr. James Grigson at Petitioner's trial violated his privilege against self-incrimination and his rights to fair notice and effective assistance of counsel." This issue was raised because (among other reasons), (1) Dr. Grigson at no time told Petitioner that he had a right to remain silent, and (2) Dr. Grigson at no time told Petitioner that he had a right to have an attorney present, or to consult with an attorney.

At the time the State presented Dr. Grigson's testimony to the jury I did not make those *specific* objections to his testimony. His appearance at the trial was a complete surprise to me. I asked for a hearing outside

the presence of the jury and attempted to explore the reasons why Dr. Grigson had gone to see my client, who had sent him, etc. I then made a general objection to his testimony prior to his testifying in front of the jury. This objection was based on all the matters brought out in the just-completed hearing, primarily that the State was presenting him without listing his name as a witness before trial in violation of a Motion, granted by the Court, in which his name should have been listed as a witness.

I did not make the specific objections raised in this Habeas Petition because so far as I knew at the time this had been a routine psychiatric examination by a court-appointed psychiatrist to determine the defendant's competency to stand trial. I was certain in my own mind, as was my co-counsel, that a defendant had no guaranteed right under Texas law to have an attorney present at such an interview, or that he should be advised he could remain silent. At the time the *Ernest Benjamin Smith* case was tried, there was no Texas authority on the point. The Court of Criminal Appeals has since held that a defendant is guaranteed no such rights under Texas law.

In my application for Writ of Habeas Corpus filed in Judge R. T. Scales (trial) Court I raised these issues of Due Process. Judge Scales denied the application without a hearing. I raised the same issues in my application for Habeas relief before the Texas Court of Criminal Appeals. This also was denied without hearing.

Because the law in Texas did not recognize the right of a defendant to have an attorney present at a competency interview with a psychiatrist, I felt a more appropriate objection to Dr. Grigson's testimony was the one I gave.

At the time I was surprised that there could be anything Dr. Grigson could testify to on punishment that would be germane to the issues. I certainly had no suggestion that the State intended to use Dr. Grigson's testimony as a basis for sending Ernest Benjamin Smith to the Electric chair.

/s/ John F. Simmons
JOHN F. SIMMONS
Attorney for Petitioner

JURAT

Before me, Bonnie Spencer, a Notary Public in and for Dallas County, Texas, appeared John F. Simmons, and after being duly sworn by me on this the 21st day of December, 1977, John F. Simmons declared to me that the matters contained in the above Affidavit are true, and that he has affixed his name to same.

/s/ Bonnie Spencer
Bonnie Spencer, Notary Public
In and for Dallas County, Texas

CERTIFICATE OF SERVICE

I, JOHN F. SIMMONS, do hereby certify that I have this date served a sworn copy of this Affidavit on Miss Cathy Fry, Assistant Attorney General, by hand-delivering same to her at her offices, second floor, M-K-T Building, corner Commerce and Market Sts., Dallas, Texas, 75202, this the 21st day of December, 1977.

/s/ John F. Simmons
JOHN F. SIMMONS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Ernest Benjamin SMITH

v.

W. J. ESTELLE, Jr., Director,
Texas Department of Correction, and Warden,
Ellis Unit, Texas Department of Corrections.

No. CA3-77-0544-F.

Dec. 30, 1977.

New Trial Denied March 27, 1978.

John F. Simmons, Dallas, Tex., Joel Berger, New York City, Anthony G. Amsterdam, Stanford, Cal., for petitioner.

Joe B. Dibrell, Jr., Asst. Atty. Gen., Chief, Enforcement Div., Anita Ashton, Asst. Atty. Gen., Austin, Tex., for respondents.

MEMORANDUM OPINION

ROBERT W. PORTER, District Judge.

During the early morning hours of September 28, 1973, Ernest Benjamin Smith and Howie Ray Robinson entered a Schepps Grocery in Dallas County, Texas, intending to rob the store. Robinson placed a package of lunch meat and a jar of mustard on the counter while Smith held a gun on the cashier and said "This is a holdup." The cashier moved suddenly as if to reach for something and Smith yelled either "Get him Howie" or "Look out Howie." Robinson then fatally shot the cashier. Smith and Robinson removed the money from the register and a gun from underneath the counter and left for the home of a friend where they divided the money.

Robinson and Smith were apprehended and charged with the offense of murder with malice aforethought in

the course of a robbery. Judge R. T. Scales of the 195th Judicial District Court of Dallas County appointed John Simmons to represent Smith and, one year later, appointed attorney Howard G. Wilson to assist Mr. Simmons. A motion to sever Smith's case from his co-defendants' was granted.

Robinson's case went to trial and he was convicted. However, on April 20, 1977, this conviction was overturned by the Texas Court of Criminal Appeals which held that admission of testimony that a state's witness had taken and passed a lie detector test was reversible error. *Robinson v. State*, 550 S.W.2d 54 (Tex.Cr.App. 1977). Robinson was retried and again convicted. On December 2, 1977, however, Texas District Court Judge Richa[illegible]ays granted Robinson a new trial and the case is currently pending. *State of Texas v. Howie Ray Robinson*, No. C-74-3195-PNQ.

In the Smith case the grand jury returned a bill of indictment on December 28, 1973 and the state gave notice that it intended to seek the death penalty. Some time prior to February 18, 1974, Judge Scales instructed the state's attorney Doug Mulder to arrange a psychiatric examination of Smith by Dr. James P. Grigson, a psychiatrist.[1] Dr. Grigson was asked to determine whether Smith was competent to stand trial.

"In all cases where the State has sought the death penalty," Judge Scales testified in this proceeding, "I have ordered a mental evaluation of the Defendant to determine his competency to stand trial. I have done this for my benefit because I do not intend to be a participant in a case where the Defendant receives the death penalty and his mental competency remains in doubt."

Dr. Grigson visited Smith on February 18, 1974 and after a ninety minute examination concluded that the defendant was competent to stand trial. In a letter to Judge Scales Dr. Grigson wrote: "It is my opinion that Ernest Benjamin Smith, Jr. is aware of the difference

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[1] Statement of Facts. *State v. Smith* (hereinafter cited as "Record") Vol. VI at 2929. [I will refer to the numbers on the bottom of the pages in the record. A different set of numbers appears at the top of each page.]

between right and wrong and is able to aid an attorney in his defense." This conclusion approximates the test for competency.[2] Dr. Grigson's letter was filed among the court papers.

This competency evaluation was ordered even though Mr. Simmons and Mr. Wilson had not put into question Smith's competency to stand trial or the related psychiatric issue of Smith's sanity at the time of the offense. Judge Scales' practice of ordering competency hearings in death penalty cases, however, cannot be faulted in the least even when the issue has not been previously raised. The Court has authority to protect the integrity of the judicial system by making certain only mentally competent defendants stand trial.

It is also Judge Scales' practice to notify defense counsel that the psychiatric examination will be conducted. However, inexplicably in this case that notification was never received by either Mr. Simmons or Mr. Wilson. No formal order of appointment was entered and possibly due to the heavy workload of the Court, less formal notification was not accomplished. Dr. Grigson never filed a written report of his evaluation[3] but did send a letter summary of his conclusions to Judge

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[2] *See Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

[3] This failure to file a written report of the examination would violate Art. 46.02 § 3(d) of the Texas Code of Criminal Procedure which was amended after Smith's trial. The section provides:

> A written report of the examination shall be submitted to the court within 30 days of the order of examination, and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney. The report shall include a description of the procedures used in the examination, the examiner's observations and findings pertaining to the defendant's competency to stand trial, and recommended treatment. If the examiner concludes that the defendant is incompetent to stand trial, the report shall include the examiner's observations and findings about whether there is a substantial probability that the defendant will attain the competence to stand trial in the foreseeable future.

Scales. Again, through some mixup, Mr. Simmons and Mr. Wilson never received a copy of this letter and first discovered it while reviewing the court papers after picking the jury in Smith's trial which commenced on March 11, 1974. This was their first notice that a psychiatrist had been appointed and had examined the defendant. Mr. Simmons testified that "although I had not known of the letter or the visit before seeing the letter in the file, I attached no significance to it. From the contents of the letter I just assumed that Judge Scales wanted to be satisfied in his own mind that the defendant was competent to stand trial. He had never asked me that question but if he had I would have answered affirmatively. Ernest had never had any mental problems and was above average intelligence in my opinion."

Logically Dr. Grigson's appointment should not have concerned Mr. Simmons. A motion to discover the state's list of witnesses had been granted and Dr. Grigson's name did not appear. There was therefore no danger that possibly incriminating statements made by Smith to Dr. Grigson would be used at the guilt or innocence stage of the trial. There was also no reason to believe Dr. Grigson would be used at the punishment stage. The question of competency or sanity had never been raised, no prospective juror was questioned on this issue and absolutely no evidence at the guilt or punishment stage was introduced by the defense as to Smith's competency, sanity or any other potential personality disorder.

The capital murder trial in Texas is held in two stages. In the first stage the jury determines whether the defendant is guilty or innocent of the offense. The jury found Smith guilty as alleged in the indictment. Once guilt has been established the trial moves into the punishment phase. After hearing evidence in this proceeding, the jury must determine on the basis of all the evidence it has heard whether the Defendant should be put to death or given a life sentence. The death penalty may be imposed only if the jury answers "yes" to each of three

special issues submitted to it.[4]

The state has the burden of proving beyond a reasonable doubt that these answers should be "yes." If the state fails in its proof or if the jury answers "no" on any one of these three issues the death penalty may not be imposed.[5] Because the state has the burden of proof it introduces testimony first in the punishment proceeding followed by the defense.

In this case, however, the state took the unusual step of resting subject to reopening.[6] Judge Scales permitted

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[4] The special issues—as provided in Art. 37.071(b) of the Texas Code of Criminal Procedure Supp. 1976-77 read:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

[5] Jurek v. State of Texas, 428 U.S. 262, 269, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

[6] The Court: As I understand it, Mr. Mulder, you are going to rest—how do you want to word it? Subject to the right to reopen?

Mr. Mulder: Whatever your pleasure is. However, I don't think they're going to know one way or the other. We can do it right now. They can come in, and the Defense and be calling witnesses?

The Court: Mr. Simmons?

Mr. Simmons: I didn't understand.

The Court: He doesn't have any testimony right now, but will have.

Mr. Mulder: We will rest right now in the record.

The Court: Subject to your right to reopen if they don't put on any testimony?

Mr. Tokoly: I think since we are permitting them to go first, if they can start putting on their testimony as if that's the normal thing to do, then we will put on our testimony after theirs.

The Court: That's fine. Since the state has the right to go

this procedure after making clear on the record that the state had the right to go first.

Mr. Simmons called three witnesses, one of whom testified, in effect, that Smith's gun was broken and would not fire on the night of the robbery. Smith's step-mother, the second witness, testified that the defendant had graduated from high school, that he was a truthful person and that he had received an honorable discharge from the military service. Smith's aunt, the third witness, corroborated the step-mother's testimony. The defense rested. Mr. Mulder then announced his intention to call Dr. Grigson. Mr. Simmons objected and this objection was overruled. When this occurred Mr. Simmons asked that the prosecution not be permitted to tell the jury that Dr. Grigson was appointed by the court. Judge Scales initially granted this motion but, after hearing additional argument from Mr. Mulder, reversed his ruling. The jury was informed that Dr. Grigson was the court appointed psychiatrist. They were not told he was appointed for the sole purpose of determining Smith's competency to stand trial. Mr. Simmons was permitted to take Dr. Grigson on *voir dire* out of the presence of the jury and it was established that Mr. Mulder had contacted Dr. Grigson the previous Thursday and said that his testimony would be needed in the Smith case. Dr. Grigson, who does much court related work,[7] responded that he would be available when

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first,I wanted to show something in the record concerning you resting at this time.

Mulder: That's fine, Judge, with that understanding.

Record at 2910-11.

[7] Dr. Grigson testified that at the time of the trial he had been in full time private practice for about six years and six months. Record at 2933. He had examined almost 8,000 persons charged with criminal offenses and had testified several hundred times in court. For appellant cases where Dr. Grigson's testimony has been at issue see e.g., *Bruce v. Estelle*, 536 F.2d 1051, 1060 (5th Cir. 1976), cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977) (Judge Mahon's reliance on Dr. Grigson's diagnosis held clearly erroneous); *Benavides v. Mutual Life Insurance Co.*

needed.

Dr. Grigson's psychiatric testimony may be summarized as follows. On direct examination he testified (1) to his credentials as a psychiatrist; (2) to the types of examinations administered by him to Smith; (3) to the results of those examinations; (4) that Smith is medically and legally sane; (5) that Smith has a sociopathic personality disorder; (6) to the characteristics of the sociopath; (7) that there are degrees of sociopathy and Smith is on the very severe end of that scale; (8) that the prognosis is Smith will continue his previous behavior or get worse; (9) that Smith has no regard for other persons' property or lives; (10) that no treatment to improve his condition exists; (11) that Smith will commit criminal acts of violence that will constitute a continuing threat to society if given the opportunity to do so; (12) that Smith is a leader. On cross examination Dr. Grigson testified (1) that it is not known what causes a person to be a sociopath; (2) that for the basis of his diagnosis, he spent approximately an hour and one-half examining Smith but did not interview friends and relatives who knew Smith with the exception of Howie Robinson whom he examined in connection with Robinson's criminal trial arising out of the same incident; (3) that he is certain that Smith is a severe sociopath; (4) that his diagnosis of socio-

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of New York, 516 F.2d 393, 398-99 (5th Cir. 1975); *Bruce v. Estelle*, 483 F.2d 1031, 1035, 1038-40 (5th Cir. 1973); *Collins v. State*, 548 S.W.2d 368, 377-78 (Tex.Cr.App.1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1611, 51 L.Ed.2d 811 (1977); *Graham v. State*, 546 S.W.2d 605, 609 (Tex.Cr.App.1977); *Ex Parte Dickey*, 543 S.W.2d 99, 104 (Tex.Cr.App.1976); *Livingston v. State*, 542 S.W.2d 655, 661-62 (Tex.Cr.App.1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); *Lee v. Thomas*, 534 S.W.2d 422, 424 (Tex.Civ.App. Waco, 1976, ref., n.r.e.); *Hicks v. State*, 525 S.W.2d 177, 180 (Tex.Cr.App.1975); *Garza v. State*, 522 S.W.2d 693, 694 (Tex.Cr.App.1975); *Jackson v. State*, 516 S.W.2d 167, 173 (Tex.Cr. App.1974); *Hurd v. State*, 513 S.W.2d 936, 946 (Tex.Cr.App.1974); *Armstrong v. State*,502 S.W.2d 731, 735 (Tex.Cr.App. 1973); *Culley v. State*, 505 S.W.2d 567, 569 (Tex.Cr.App. 1974); *Wilborn v. State*, 491 S.W.2d 432, 433 (Tex.Cr.App.1973); *Boss v. State*, 489 S.W.2d 580, 582 (Tex.Cr.App.1973); *Williams v. State*, 463 S.W.2d 15, 17 (Tex.Cr.App. 1971); *Blankenship v. State*, 432 S.W.2d 945, 946-47 (Tex.Cr.App. 1968).

pathic personality was based on Smith's failure to show any guilt feelings or remorse with respect to the commission of the offense for which he was on trial; (5) that during the examination Smith was pleasant, cooperative, polite, intelligent, rational, courteous, and did not try to fake insanity; and (6) that sociopathic symptoms may show up as early as age four or five, or may not appear until age thirty.[8]

Dr. Grigson was the state's only witness at the punishment phase. After his testimony concluded, the jury retired to consider its verdict. It returned with "yes" answers to all three questions which meant that under Texas law Ernest Benjamin Smith would be put to death. The Texas Court of Criminal Appeals affirmed Smith's conviction and his sentence.[9] The United States

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[8] The summary of Dr. Grigson's testimony is borrowed largely from the excellent summary found in Judge Odom's opinion dissenting in part from the ruling of the Texas Court of Criminal Appeals in this case. After the U.S. Supreme Court ruled in *Jurek*, Judge Odom withdrew his dissent. One other matter concerning Dr. Grigson's testimony concerns this Court.

Dr. Grigson testified that: "With regard to his (Smith's) emotional state, for the most part throughout the examination he was very pleasant, very cooperative, very polite. The one significant fact which was present was I could find absolutely no signs of any remorse or any type of guilt feelings. I thought this was very important in the situation that existed."

"Again, I could find no remorse feelings, no guilt feelings." Record at 2941.

It appears that Smith made a "quasi" confession during the course of the examination as was brought out during cross examination of Dr. Grigson. Record at 2950-52. Therefore, it appears that Smith, in effect, established his guilt in Dr. Grigson's eyes which enabled him to determine that the defendant showed no remorse or guilt feelings which in turn formed the basis for the diagnosis. Although not the case here, it troubles this court that a psychiatrist might, during an examination where no "confession" is given, assume the defendant's guilt which then forms the basis of the psychiatric diagnosis. This certainly seems to be at odds with the presumption of innocence to which all criminal defendants who plead not guilty have a constitutional right.

[9] *Smith v. State of Texas*, 540 S.W.2d 693 (1976).

Supreme Court denied certiorari.[10] A state writ of habeas corpus was denied by Judge Scales on April 18, 1977. The Texas Court of Criminal Appeals denied a similar writ on April 19, 1977 and Smith's execution was set for April 26, 1977. On April 22, 1977 I entered an order staying that execution pending review of Smith's federal writ of habeas corpus filed April 21, 1977.

That review has now been completed and because I find the death penalty was imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution it is hereby vacated. No constitutional error has been found with respect to the guilt phase of the trial.[10A]

Having reviewed the relevant facts of this case and having stated my legal conclusions, I would like to elaborate on why these facts present issues of constitutional dimension.

A. Due Process of Law.

A majority of the United States Supreme Court has held that the death penalty not only differs in degree from any other punishment that may be imposed but that it is different in kind. It is therefore imperative both to the defendant and the community that the decision to impose the death penalty reflect a reasoned judgment devoid of caprice or emotion and derived from all the available evidence presented at a fair proceeding. *See Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct.

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[10] 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977).

[10A] The State takes the position that Smith may not be retried under state law on punishment alone. Thus, the State contends, that if Smith is to be given the death penalty he must also be tried again on guilt or innocence. This is a question of state law and need not be addressed here. If permissible under state law the attorney general may wish to forego a retrial on punishment which would result—presumably—in a life sentence. Whatever decision the Texas Court of Criminal Appeals reaches on these issues it should be clearly understood that I find constitutional violations only at the punishment stage and not during the guilt or innocence proceedings.

1197, 51 L.Ed.2d 393 (1977); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The fairness of the sentencing process is measured by the due process clause, and, as it is a critical stage of the criminal proceedings, the defendant is entitled to the effective assistance of counsel. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. *Gardner v. Florida, supra*, 430 U.S. at 358, 97 S.Ct. at 1205.

As the Supreme Court has often stated "once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). In general the procedural protections required by the due process clause vary according to the demands of the particular situation. In this case I find that because of the private interest affected by the government's action the situation demanded more procedural protection than was afforded.

The state's evidence at the punishment stage was introduced in such a way as to deny defense counsel effective cross examination of Dr. Grigson. It is impossible for even the best lawyers to effectively cross examine a medical expert without any preparation. A review of the record shows that Mr. Simmons was not an exception to this rule. Although a psychiatrist's methodology and conclusions are susceptible to impeachment by those knowledgable in the field, they are virtually impregnable to challenge by one who is not a psychiatric expert and totally unprepared to question on this subject matter. Mr. Simmons did not know that Dr. Grigson was going to be a witness at the punishment proceedings until a few minutes before he was called. Effective cross examination under these circumstances was virtually impossible. Criminal convictions have been reversed in the past when they have been procured through government

"cloak and dagger" tactics in introducing surprise testimony. *See Riggs v. United States*, 280 F.2d 750, 753-54 (5th Cir. 1960).

Dr. Grigson's testimony was also presented—after the defense had rested—in a manner which precluded the opportunity to obtain expert psychiatric testimony for the defendant.[11] Effective cross examination and the ability to obtain a psychiatric expert for the defendant are especially critical when psychiatric testimony is introduced because studies have shown that the opinions of psychiatrists in this area are often unreliable and invalid.[12] The unreliability and invalidity of the opinion is heightened

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[11] The Fifth Circuit Court of Appeals has held that failure to provide expert psychiatric assistance may deprice an indigent defendant of effective assistance of counsel. *Greer v. Beto*, 379 F.2d 923, 924 (5th Cir. 1967). *Hinz v. Beto*, 379 F.2d 937 (5th Cir. 1967).

[12] "Reliability" and "validity" are terms of art found in the psychiatric literature. Reliability does not have a precise meaning. See L. Cronbach, Essentials of Psychological Testing 173-82 (3rd ed. 1970). Reliability generally refers however, to the probability or frequency of agreement when two or more independent observers answer the same question. For example, is Smith dangerous? If representative pairs of psychiatrists, interviewing a representative sample of prospective patients, usually agree that each individual is or is not "dangerous" the judgment of "dangerousness" is said to be reliable. Conversely, if pairs of psychiatrists would not usually agree whether such individuals are dangerous, that judgment is said to be unreliable.

"Validity," on the other hand, refers to not how likely psychiatrists are to agree to a particular judgment but to how accurate their judgments are. If every psychiatrist in the world agrees that Smith would commit a dangerous act if released from the hospital, that judgment would be 100% reliable. But if Smith were released and does not commit a dangerous act, the judgment would be invalid. Similarly, psychiatric judgments of "dangerousness" would be generally reliable if most observers would agree whether or not given individuals are dangerous, yet invalid if those judgments usually would be wrong.

For studies detailing the invalid and unreliable nature of psychiatric examinations *see, generally* Ennis & Flitwack, Psychiatry and the Presumptions of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 697 (1974) (Footnotes omitted).

where, as here, the psychiatrist is appointed for one purpose—to determine competency—but testifies on a completely different matter—whether the defendant will commit similar acts of violence in the future, (hereinafter referred to as "dangerousness").[13] The prejudice is compounded when the Court—by permitting the prosecutor to inform the jury that the doctor is court appointed—vouches in effect for the accuracy of the psychiatrist's opinions on "dangerousness" even though the judicial appointment was to determine "competency."

Even a cursory review of the psychiatric literature reveals that psychiatrists differ widely in their diagnosis of the same patients. The testimony of psychiatric experts is receiving increased judicial scrutiny because of its unreliable and invalid nature. *See United States ex rel. Wax v. Pate*, 298 F.Supp. 164 (N.D.Ill.1967), *affirmed* 409 F.2d 498 (7th Cir.), *cert. denied*, 396 U.S. 830, 90 S.Ct. 83, 24 L.Ed.2d 81 (1969). *Cf. Specht v. Patterson*,

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[13] In *United States v. Mattson*, 469 F.2d 1234 (9th Cir. 1972) cert. den'd, 410 U.S. 986, 93 S.Ct. 1513, 36 L.Ed.2d 183 (1973) the court indicated that unless counsel was notified of the dual purpose of the psychiatric exam—determination of both competency and sanity—was ordered the psychiatric evidence would be inadmissible. In *United States v. Alvarez*, 519 F.2d 1036, 1041 (3rd Cir. 1975), the court held that failure in an order, to provide for the dual nature of the examination would render the psychiatric testimony inadmissible. *See also Birdsell v. United States*, 346 F.2d 775 (5th Cir. 1965), cert. denied, 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366 (1966) where the court stated:

> "Although '[I]t is not to be assumed * * * that a psychiatrist who has been ordered to prepare an opinion as to a man's trial competency will conduct the type of examination which is necessary to provide the trier of the facts with the information essential for a proper determination of criminal responsibility,' *Winn v. United States* [106 U.S.App.D.C. 133], 270 F.2d 326, 328 (1959), a record may show that this was in fact done, and we think that was the case here." 346 F.2d at 780.

See also United States v. Driscoll, 399 F.2d 135, 137 (2nd Cir. 1968) ("We do not believe that a defendant can be told that he is to be examined for one purpose and, once his cooperation has been obtained, be advised of another.")

386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).[14]

This judicial scrutiny reflects skepticism among experts in the field itself. In 1969 Professor Dershowitz reviewed studies on the predictions of anti-social conduct and concluded:

> ". . . that psychiatrists are rather inaccurate predictors—inaccurate in an absolute sense and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes, it seems that psychiatrists are particularly prone to one type of error—over prediction. They tend to predict antisocial conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions. That is, among every group of inmates presently confined on the basis of psychiatric predictions of violence, there are only a few who would, and many more who would not, actually engage in such conduct if released."

Dershowitz, The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways, *Psychology Today*, Feb. 1969, at 47.

Recent studies support Professor Dershowitz's conclusions: "perhaps the most striking evidence supporting Dershowitz's conclusions comes from the study of the results of "Operation Baxstrom" involving 969 prisoner-patients in New York State who were affected by

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[14] As the court in *United States ex rel. Wax v. Pate*, 298 F.Supp. 164, 167 (N.D.Ill.1967) noted:

> "It is an accepted fact of which the court will take notice that the results of psychiatric observations and examinations are often a good bit more conjectural than the results of scientific laboratory tests on finger prints, blood samples, hair and the like. The variables and technique are many. And indeed, considerable ferment has been engendered as to the sufficiency of the present legal tests of insanity."

the Supreme Court's decision in *Baxstrom v. Herold.* [383 U.S. 107, 86 S.Ct. 760 15 L.Ed.2d 620 (1966)]. The Court held that those persons remaining in Department of Corrections Hospitals after their prison terms had expired must be released, and committed civilly, if at all. Each of the 969 patients had been detained in maximum-security hospitals because psychiatrists determined that they were mentally ill and too dangerous for release or even for transfer to civil hospitals. Nevertheless, one year after the patients were transferred to civil hospitals, 147 had been discharged to the community and the 702 who remained were found to present no special problems to the hospital staff. Only seven patients were found to be so difficult to manage or so dangerous as to require recommitment to a Department of Corrections hospital. Several years later, 27% of the patients were living in the community, only nine had been convicted of a crime (only two of felonies), and only 3% were in a correctional facility or hospital for the criminally insane.

"Another recent study, described by one observer as the 'most extensive study to date on the prediction . . . of dangerousness in criminal offenders' confirms the lesson of *Baxstrom.* A team of at least five mental health professionals, including two or more psychiatrists, was asked to conduct unusually thorough clinical examinations of individuals who had been convicted previously of serious assaultive crimes (often sexual in nature), assigned to special treatment programs after conviction, and who were then eligible for release. Based upon the examinations, extensive case histories, and the results of psychological tests, the team attempted to predict which individuals again would commit assaultive crimes if released. These predictions of dangerousness were made prior to the court hearings at which the ultimate release decisions were made. Of 49 patients considered by the evaluating team to be dangerous and therefore not recommended for release, but who nevertheless were released after a court hearing, 65% had not been found to have committed a violent crime within five years of

returning to the community. *In other words, ⅔rds of those released despite predictions of dangerousness by the professional team did not in fact turnout to be dangerous.*" Ennis & Litwack, Psychiatry and the Presumptions of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 712-13 (1974) (Footnotes omitted) (emphasis supplied.)

I do not believe that psychiatric testimony should be excluded per se from the guilt/innocence trial and/or circumscribed in the punishment stage as some legal scholars have suggested. *See Bartholomew & Milte*, The Reliability and Validity of Psychiatric Diagnosis in Courts of Law, 50 Austr.L.J. 450 (1976). I hold only that when the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant. When that fair opportunity is denied the defendant, as it was here, our adversary system breaks down and a man is unjustly sentenced to die.

In the future to insure the right to effective cross examination and the right to effectively defend the case through expert rebuttal testimony, which the due process clause guarantees, defense counsel must be notified that a psychiatric examination will be held on the issue of "dangerousness" the results of which may be used at the penalty phase of the trial. Defense counsel prior to trial, must have meaningful access to the report, now required by state statute, prepared by the psychiatrist stating his findings and conclusions. If the trial court wishes to appoint a psychiatric expert on the issue of dangerousness the order of appointment should so reflect. The testimony of a court appointed psychiatrist and his report would then be equally available to both defense and prosecution for presentation to the jury.[15]

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[15] When the psychiatrist is not appointed on the issue of "dangerousness" (but limited to competency, for example) and the prosecutor nevertheless intends to use the psychiatrist at the penalty

However, both sides should have a meaningful right to obtain additional psychiatric experts to either supplement or challenge the conclusions of the court appointed expert.

In summary, the due process clause of the Fourteenth Amendment was violated in this case because (1) Dr. Grigson was informed of his appointment by the prosecutor and not through written order of the court; (2) defense counsel was never notified of the appointment; (3) a psychiatric report was never filed; (4) defense counsel never received a copy of Dr. Grigson's letter summarizing his conclusions, sent to the judge; (5) the state's attorney intentionally omitted Dr. Grigson's name from the witness list in violation of the trial court's order even though the prosecutor knew at least several days before the punishment stage that Dr. Grigson would be called as a witness and that his testimony would not be rebuttal testimony but would be critical to the state's case; (6) the psychiatrist was appointed to determine competency but was permitted to testify on the completely unrelated issue of "dangerousness" and; (7) the trial judge permitted the state's attorney to create the impression with the jury that Dr. Grigson had been appointed by the court for the purpose of determining the defendant's "dangerousness" and that the court was therefore vouching for Dr. Grigson's testimony.[16]

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stage on the issue of dangerousness, notice of this intention must be given to defense counsel. In that event, the jury may not be told that the psychiatrist is court appointed.

[16] Under the above described circumstances, I find that Mr. Simmons and Mr. Wilson protected their client's interest to the extent possible. However, if one assumes that there is no error in the manner in which Dr. Grigson's testimony was introduced, that would inevitably lead to the conclusion that Smith was denied the effective assistance of counsel because they failed to produce rebuttal psychiatric testimony and to explore the ramifications of the psychiatric issue. *See United States v. Edwards*, 488 F.2d 1154, 1164-65 (5th Cir. 1974). If I found Mr. Simmons and Mr. Wilson did not provide effective assistance of counsel, which I decline to do, then Smith's penalty would be rendered constitutionally invalid on that ground.

B. The Death Penalty and Mitigating Circumstances: The Eighth Amendment.

In *Jurek v. State of Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) the United States Supreme Court upheld the constitutionality of the Texas Death Penalty Statute.[17] It found that at the sentencing stage the Texas statute assured that all possible relevant information about the individual defendant would be brought before the jury. *Jurek, supra* at 271-76, 96 S.Ct. 2950. The constitutionality of the Texas procedure rests upon the ability of the defendant to present mitigating circumstances.

For the same reasons specified in subsection A of this opinion, I find that the defendant was, in effect, denied the opportunity to present mitigating circumstances concerning his supposed personality disorder. The opportunity to effectively challenge Dr. Grigson's conclusion was not available. The opportunity to obtain and present psychiatric testimony on behalf of the defendant was not present. Finally, Dr. Grigson testified that defendant showed no remorse or guilt over the incident. When Mr. Simmons attempted to question Smith about his remorse or guilt the following took place:

Q. By Mr. Simmons: Did you tell Howie to look out when you saw Mr. Moon either reaching for a pistol or whatever else he had?

A. Yes, sir.

Q. Ernest, do you understand and know that it is wrong to do what you did and what you were involved in?

A. Yes, sir.

Q. Do you regret this thing has happened to Mr. Moon? (the murder victim)

A. Mr. Mulder, State's Attorney. We object to that.

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[17] Tex.Penal Code § 19.03 (1974); Tex.Code Crim.Pro. Art. 37.071 (Supp.1975-76).

The Court: Sustained.

Mr. Simmons: We will pass this witness, your Honor.[18]

The Texas statute, on its face, provides that all relevant evidence will be presented to the jury but, as applied in this case, the jury was clearly unable to consider all the evidence.[19] Accordingly, the death penalty in this case constitutes cruel and unusual punishment. Here the jury was told all the reasons why the death sentence should be imposed but only some of the reasons why it should not. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The State was directly responsible for causing the suppression of the additional reasons why the death penalty should not be imposed.

C. Right to Counsel and Right to Remain Silent.

In addition to challenging the death penalty on due process and Eighth Amendment grounds, petitioner has alleged a violation of right to counsel and the right to remain silent with respect to his compelled psychiatric examination. The state has responded to these chal-

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[18] Record at 2743-44. I do not believe that this was necessarily an improper objection or that the trial judge ruled erroneously. It is generally immaterial that a criminal defendant regrets now what he did in the past. At the time this objection was lodged the jury had not yet found Smith guilty. Only Mr. Mulder knew at that point in the trial that Dr. Grigson would put into issue the defendant's lack of remorse or guilt. With this knowledge the objection was perhaps improper as the jury could have been instructed not to consider the testimony on the issue of guilt but only on punishment if they returned a guilty verdict. The better procedure, however, would be to recall the defendant at the punishment phase and ask him the material questions then. Mr. Simmons, for some reason, did not do that in this case.

[19] *See Richmond v. Arizona*, ____U.S.____, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977) (Rehnquist, J.) where defendant's sociopathic personality was presented as a mitigating factor at the punishment phase. While a sociopathic personality might in some cases be used in mitigation it was not done so in this case. The state clearly argued that this sociopathic personality disorder made the defendant "dangerous" thus requiring an affirmative answer to question 2.

lenges on the merits even though neither was a ground for objection at the trial court and neither issue was presented to the Texas Court of Criminal Appeals.[20] It must be determined whether the Texas "True Contemporaneous Objection Rule" bars considerations of these two claims in this federal habeas corpus proceeding. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Jiminez v. Estelle*, 557 F.2d 506 (5th Cir. 1977); *Patterson v. State of Texas*, 509 S.W.2d 857 (Tex.Crim.App.1974). A federal district court may consider a claim in a habeas corpus petition that was not presented to the state courts, if it determines the petitioner has shown "cause" for failing to object in state court with resulting "prejudice" to the defendant. To fully develop the record, I have asked Mr. Simmons to file an affidavit explaining the reason (cause) why he did not raise these objections before either Judge Scales or the Texas Court of Criminal Appeals.

Before considering whether the showing of "cause" and "prejudice" is adequate under *Sykes*, the court must determine whether in a federal habeas corpus proceeding the state may waive the "contemporaneous objection" defense. In both *Sykes* and *Jiminez*, the state sought to uphold the convictions on the basis of the contemporaneous objection rule. *See Sykes*, at 433 U.S. 84, at 97 S.Ct. 2505-06, at 53 L.Ed.2d 607; *Jiminez* at 557 F.2d 507. Here, however, the state has joined issue on the alleged right to counsel. Likewise, the state has responded on the merits to the contention that the accused has a right to remain silent at the psychiatric exam and must be advised of that right.

It is certainly beyond question that procedural rights may be waived. There is nothing about the state's relinquishment of this procedural advantage that affects this court's jurisdiction or eliminates the existence of a live

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[20] These matters were apparently first raised in the petitioner's writ of habeas corpus before Judge Scales and subsequently, the Texas Court of Criminal Appeals. Both writs were denied without a hearing.

case or controversy. Accordingly, I hold that the "contemporaneous objection" defense may be waived and is so waived when the state decides to answer on the merits without relying either solely or in the alternative on the contemporaneous objection rule.

Even though this rule is designed to produce criminal proceedings which are as free of error as possible, the state is to be commended for not raising this procedural bar here where a constitutional issue of first impression is presented to a federal court. Although the interest in minimizing error in criminal proceedings is a weighty concern, the state also has a strong interest in determining as soon as practicable whether its procedures implementing a recently enacted statute comply with the United States Constitution.

The Texas Death Penalty Statute was revised in light of *Furman v. Georgia, supra*, and only recently upheld by the United States Supreme Court. The practice of introducing psychiatric testimony at the punishment stage of a capital case is, therefore, in its infancy. If the right to counsel and/or right to remain silent apply in a psychiatric examination, it is better for the state—in terms of minimizing error in criminal trials—to have that determination made now rather than later.

As I have found the contemporaneous objection rule inapplicable in this case, it is unnecessary to determine whether Mr. Simmons' "cause" for failing to object is adequate under *Sykes*. If I am wrong in this determination, however, the record has been made for the appellate courts, in the case of appeal, to make that determination. As outlined in Subsection A of this opinion, I believe the requirement of prejudice has clearly been met.

1. The Right to Counsel.

The Texas Court of Criminal Appeals held in *Livingston v. State of Texas*,[21] that the use of testimony ob-

[21] 542 S.W.2d 655 (Tex.Cr.App. 1976), cert. denied. 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977).

tained from a compelled psychiatric examination in a capital murder sentencing hearing does not violate the Sixth Amendment right to counsel. The Court relied on prior holdings which found no right to counsel at a psychiatric examination on competency or sanity. Although some courts require the presence of counsel[22] at a competency or sanity examination the majority view is to the contrary.[23] The 5th Circuit Court of Appeals squarely subscribes to the majority view that there is no right to counsel in a compelled psychiatric examination to determine competency or sanity. *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *cert. denied* 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976); *United States v. Smith*, 436 F.2d 787, 790 (5th Cir. 1971), *cert. denied*, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971).

The question then boils down to whether a distinction may be made between psychiatric examinations for determinations of competency or sanity and psychiatric examinations for "dangerousness." One reason for denying the right to counsel is common to all three—the presence of counsel would destroy the purpose of the examination. See *Thornton v. Corcoran*, 132 U.S. App.D.C. 232, 248, 407 F.2d 695, 711 (1969) (Burger, J., Dissenting). I agree with the comment of the now chief justice that:

> "Our approach should encourage an attitude of cooperation rather than partisanship; emphasis must be on the common pursuit for an objective, uninhibited inquiry, uncluttered by the techniques and devices of the courtroom." 132 U.S.App. D.C. 248, 407 F.2d 711.

Any right to counsel in this area would therefore have to consider the practical limitations of the psychiatric examination. In *United States v. Wade*[24] the Supreme

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[22] *See e.g. Lee v. County Court of Erie County*, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 (1971).

[23] *See e.g. United States v. Albright*, 388 F.2d 719 (4th Cir. 1968).

[24] 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

Court held there was a right to be represented by counsel at a police lineup. The *Wade* court proposed two tests for determining whether the presence of counsel is necessary: (1) potential substantial prejudice to defendant's rights which inheres in a particular confrontation and (2) the ability of counsel to help avoid that prejudice. *See United States v. Baird*, 414 F.2d 700, 711 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1005, 90 S.Ct. 559, 24 L.Ed.2d 497 (1970).

If the state follows the procedures outlined in Part A of this opinion, I have found compelled by the due process clause, the potential for substantial prejudice is minimized.[25] If one accepts that counsel may not participate in the examination, as one must if its purpose is to be preserved then the lawyer's ability to avoid any residual prejudice is minimal. I therefore hold that the right to presence of counsel is not required in a compelled psychiatric examination for the purpose of determining "dangerousness," even though I believe the examination is a critical stage of the criminal proceedings. The Sixth Amendment is not so inflexible as to require the presence of counsel when that presence would destroy the character of the proceeding, especially in light of minimal prejudice to the defendant.

The Sixth Amendment, however, also required the effective assistance of counsel. To insure this right the procedural safeguards required in Subsection A of this opinion are compelled by the Sixth Amendment as well as the due process clause of the Fourteenth. As they were unavailable to petitioner here his sentence is invalid under the Sixth Amendment.

As Chief Justice Berger observed in *Thornton*, the check on the processes by which the psychiatrist reaches his conclusion is the power to cross-examine him. Because the psychiatric examination demands privacy, the presence of counsel is not required so long as

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[25] The actual statements of the accused to the psychiatrist are inadmissible at the guilt and possibly the punishment phases of the trial. *See Livingston v. State, supra*, at 661-62.

the power of effective cross-examination and the right to gather additional expert psychiatric testimony is not impaired. 132 U.S.App.D.C. at 248, 407 F.2d at 711. That right was clearly impaired here.

2. The Right to Remain Silent.

Petitioner claims his right to remain silent under the Fifth Amendment was violated when he was examined by Dr. Grigson without notice to his counsel and without being advised that he had a right to remain silent. The State contends that there is no constitutional right involved because communications at the psychiatric examination are non-testimonial. One commentator has written that this is the "best" reason for holding that the Fifth Amendment privilege against self incrimination does not apply to a compelled psychiatric examination on the issue of dangerousness. *See* Crump, Capital Murder: The Issues in Texas, 14 Hou.L.Rev. 531, 574-75 (1977).

The Texas Court of Criminal Appeals has refused to apply the Fifth Amendment privilege to a compelled psychiatric examination on dangerousness. The court found that the communications involved in such an examination were not testimonial. *See Livingston v. State of Texas*, 542 S.W.2d 655 (Tex.Cr.App.) *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977).

A federal court is not, of course, bound by a state court's determination of federal law. I believe, therefore, an independent look at this problem is required. so-called "testimonial" limitation on the privilege against self incrimination is rooted in Mr. Justice Holmes' opinion in *Holt v. United States*, 218 U.S.245, 31 S.Ct.2, 54 L.Ed. 1021 (1910). In *Holt* the Defendant was compelled to try on a blouse to show that it fit him. Mr. Justice Holmes stated that: "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to exhort communications from him, not an exclusion of his body as evidence when it may be material." 218 U.S. at 252-53, 31 S.Ct. at 6. In *Schmerber v.*

California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) the Supreme Court followed the Holmes reasoning in holding that the privilege against self incrimination was not violated by the taking of a blood sample over the objection of a criminal defendant. It was held that the resulting blood sample "was neither petitioner's testimony nor evidence relating to some communicative act. . . ." 384 U.S. at 765, 86 S.Ct. at 1833.

In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) the Supreme Court found no Fifth Amendment violation where the Defendant was compelled to speak within hearing distance of witnesses to the alleged crime. The court found this "no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse." 388 U.S. at 222, 87 S.Ct. at 1930. In *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) the court held that requiring a Defendant to provide a handwriting exemplar would not violate the privilege. The Court stated that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." 388 U.S. at 266-267, 87 S.Ct. at 1953.

Finally, in *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) the court refused to apply the privilege to compelled voice exemplars which were obtained for comparison with tape recordings of alleged criminal activity. The Court wrote: "*Wade* and *Gilbert* definitely refute any contention that the compelled production of the voice exemplars in this case would violate the Fifth Amendment. The voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said." 410 U.S. at 7, 93 S.Ct. at 768. (footnote omitted).

All of these cases reach only those situations where identifiable physical characteristics or properties of the Defendant are compelled. *See People v. Evans*, 90 Misc.2d 195, 393 N.Y.S.2d 674 (1977).[26] It does not mat-

[26] It strikes the court that an issue of reliability is also raised even if

ter what the Defendant speaks or what he writes when a voice or handwriting exemplar is produced. The Defendant is only being compelled to divulge the way he speaks or the manner in which he writes both of which are non-testimonial acts to which the privilege does not apply.

The compelled psychiatric examination on the issue of "dangerousness" clearly rests on different ground. Here it is not only the *way* the Defendant communicates to the psychiatrist, but also the content of *what* he says that forms the basis of the expert opinion.[27]

I, therefore, do not believe that the *Holt* line of cases inevitably leads to the conclusion urged by the State. Each of these cases has been careful to distinguish between the "content" of the communication and the "fact" of the communication. No such distinction is possible where the psychiatrist, as here, relies, at least in part, on the *content* of the communication elicited from the Defendant.[28]

It might be argued that while the Supreme Court has not extended the *Holt* doctrine to compelled psychiatric

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one assumes that the communications in a psychiatric examination are non-testimonial. This involves the requirement that the physical characteristics or properties be identifiable. No two lab technicians would disagree over the results of a blood sample or a fingerprint. Handwriting exemplars and voice exemplars may also be analyzed with some precision. A diagnosis of a person's present and past mental condition is less reliable but nevertheless much more accurate than a prediction of future behavior which inheres in a diagnosis of "dangerousness".

[27] For example:

Psychiatrist: Do you feel remorse over the victim's death?
Defendant: No I do not.
Psychiatrist: Do you feel guilt over the victim's death?
Defendant: No I do not.
Psychiatric Conclusion: The defendant shows no remorse or guilt over the victim's death and, principally for this very important reason, I believe he is a severe sociopath.

[28] Dr. Grigson clearly relied at least in part on Smith's oral communication that he felt no remorse or guilt over the incident.

examinations, many decisions of the circuits have done so with respect to the issues of competency and sanity. However, the issues of competency and sanity are distinguishable from an examination for dangerousness. When the issue of sanity is raised by the Defendant, some courts have held that the psychiatric examination may be compelled by either the state or the court as the privilege against self incrimination has either been waived or the Defendant is estopped from asserting it. *See e.g., Lee v. County Court of Erie County*, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 (1971). When the sanity defense is raised the Government must prove that the Defendant was not insane at the time the crime was committed and often the only way it may meet this burden is through expert psychiatric testimony.[29] Sanity is therefore an issue raised by the defendant where the only evidence to rebut the defense is in the possession of the defendant. Dangerousness, by contrast, is an issue raised by the prosecution where psychiatric testimony is only one of a number of ways the issue may be proved to the jury.

The issue of competency raises somewhat different problems. First, if raised by the Defendant the same principles of waiver and estoppel might apply. Second, and more importantly, psychiatric testimony on competency can rarely be used against the criminal Defendant. In many states the issue must be determined prior to the trial on the merits.[30] Third, the state and the Defendant do not have truly adverse interests in a competency evaluation. Both seek to have only mentally com-

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[29] *See, e.g., United States v. Cohen, supra.* Here, however, there are a number of other ways for the state to show "dangerousness". Thus, the jury could consider the defendant's prior criminal record, if any; the range and severity of his prior criminal conduct; his age; whether he was acting under duress or under the domination of another; and efforts to rehabilitate himself after a criminal conviction. *See Jurek v. State of Texas*, 428 U.S. at 272-73, 96 S.Ct. 2950.

[30] *See, e.g.*, Tex.Code Crim.Pro. Art. 46.02 § 2 (Supp.1976-77).

petent Defendants stand trial.

The benign effect of psychiatric testimony on the issue of competency differs sharply from the psychiatric testimony of "dangerousness". Dr. Grigson's testimony was clearly used against Smith at the punishment stage. The State, at least at one point in this litigation,[31] took the position that the only evidence in support of the jury's answer to question number two was the Grigson testimony. This testimony would have been gutted—if not rendered completely worthless, without the cooperation of Smith. That cooperation took the form of a 90 minute interview where the contents of his communications to Dr. Grigson were used against him by the State at the punishment stage of the trial.[32]

It is clear, however, that the psychiatric knife can cut both ways. Psychiatric testimony could be as beneficial to some criminal Defendants at the punishment stage as it was damaging to Smith. It may be difficult to determine prior to an examination what conclusions will result, although certain psychiatrists may gain a reputation for seeing problems in a particular way.

If the Defendant initiates a psychiatric examination on the issue of dangerousness or if he seeks to introduce psychiatric testimony at the punishment phase he can not hide behind his privilege against self incrimination when the court or the prosecutor seek to have him examined by an additional psychiatrist, or when the prosecutor attempts to introduce the testimony by the

---

[31] In its brief submitted to the Texas Court of Criminal Appeals the state relied solely upon Dr. Grigson's testimony to support the jury finding on question 2. The Court of Criminal Appeals seemed to rely in addition on the facts of the primary offense, a five year probated sentence for possession of marijuana and a poor employment record.

[32] It would be constitutionally permissible for a psychiatrist to merely observe the defendant for the purposes of diagnosis. But whether mere observations would be legally sufficient to form the basis for a medical opinion on dangerousness need not be decided here.

Defendant's expert, or its own expert at the punishment phase. In such cases the Defendant would waive his privilege against self incrimination, and also any doctor-patient privilege.

If, however, the Defendant does not request a psychiatric examination on the issue of "dangerousness" and does not seek to introduce testimony on this issue, he may not be compelled to participate in a psychiatric examination to determine dangerousness.

A difficult problem of waiver is presented when the Defendant raises the insanity defense but is nevertheless found guilty. At the punishment stage may the jury consider the psychiatric evidence on sanity as a mitigating factor and, if so, may the state then introduce psychiatric testimony on dangerousness? Ordinarily the jury would be permitted to consider the Defendant's psychiatric evidence on sanity as a mitigating factor. If the Defendant intends to rely on this testimony at the punishment stage, he then waives his privilege against self incrimination and the State may have a psychiatrist examine the Defendant on the issue of dangerousness and introduce testimony on this issue before the jury.

If, however, the Defendant does not wish to rely on his psychiatrist's insanity testimony at the penalty stage then the jury must be instructed to disregard the psychiatric testimony as a mitigating factor and the privilege against self incrimination may be asserted to foreclose either a compelled psychiatric examination on the issue of dangerousness or evidence from a court appointed or state psychiatrist on dangerousness learned from a sanity or competency examination.

In the future if the State or Court seeks to have the Defendant examined by the psychiatric expert on the issue of dangerousness, the Defendant must be advised he has a right to remain silent. If the Defendant indicates that he wishes to exercise that right, he may be questioned by the psychiatrist for the purpose of determining dangerousness.

Smith was not so advised in this case and his sentence

of death is thus in violation of the Fifth Amendment of the United States Constitution.

(D) Conclusion.

The Petitioner has alleged several additional constitutional violations[33] but as I have found no such violation with respect to the guilt or innocence phase and as I have granted the relief requested with respect to the punishment phase it is unnecessary to reach these additional issues.

In summary, it is this Court's opinion that:

(1) The circumstances surrounding the state's presentation of Dr. Grigson's testimony at the punishment stage of the trial were grossly unfair and the Defendant was thus denied due process of law;

(2) The Defendant was effectively denied the right to present complete testimony regarding mitigating factors on his alleged personality disorder which supposedly makes him a continuing threat to society;

(3) The Defendant was denied the right to effective assistance of counsel because of the methods employed by the state with respect to the Grigson testimony; there is, however, no right to the presence of counsel at a psychiatric examination on dangerousness;

(4) The Defendant was not advised of his right to re-

---

[33] The petitioner raises an interesting point concerning the severity of the death penalty for a defendant who does not actually pull the trigger. This is the so-called non-triggerman issue which is currently before the United States Supreme Court. *Bell v. Ohio*, 433 U.S. 907, 97 S.Ct. 2971, 53 L.Ed.2d 1091 (1977).

It strikes this court that there may be instances where the non-triggerman is just as culpable as the triggerman. I believe this case is one of them although the fact that this defendant did not actually commit the murder certainly is a mitigating factor for the jury's consideration. At any rate, I believe it would be unwise to adopt a *per se* rule for non-triggermen. One can envision a situation where one person, shouldering and aiming a bazooka for his trigger pulling accomplice is as culpable as his cohort.

Whatever the merits or demerits of this controversy, it should be resolved soon by the Supreme Court and, in light of the present posture of this case, it is unnecessary to decide that question here.

main silent at the psychiatric examination on dangerousness where he did not seek to introduce psychiatric testimony on the issue himself at the punishment stage or at the guilt/innocence stage and where he did not initiate a psychiatric examination on the issue.

Some may be shocked that a convicted murderer has for the moment escaped death through what may seem to them a legal technicality. But whereas "technicalities" are often thought of as mindless and silly elevations of form over substance the procedures denied to the Defendant in this case are basic and fundamental. They may be summed up in one word—fairness. And one need not condone the acts of this Defendant to agree that he is entitled to a fair proceeding and that he is entitled to the same opportunity to put on his evidence as is given the State.

Our legal procedures—as opposed to superfluous "technicalities"—separate our judicial system from virtually all others in the history of the world. They separate us from those systems where rights are guaranteed on paper but denied in practice. They separate us from those systems where the guilt of the Defendant is never to be doubted. They separate a free country from a controlled one.

The money and effort the State of Texas will be forced to spend retrying the penalty phase of this Defendant's trial is the price our continued freedom and independence demand.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST BENJAMIN SMITH,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CAUSE NO.
	§	CA3-77-0544-F
W. J. ESTELLE, JR.,	§	
DIRECTOR,	§	
TEXAS DEPARTMENT	§	
OF CORRECTIONS,	§	
et al	§	
	§	
Respondents.	§	

ORDER - Filed March 27, 1978

Respondents in this habeas corpus proceeding have moved for a new trial pursuant to Rule 59(a), Fed. Rules of Civ. Pro., 28 U.S.C.(1970). Although there generally is no trial in the first place in a habeas proceeding Rule 59 is nevertheless applicable. *Forbes v. Wainwright*, 425 F.2d 724 (5th Cir. 1970).

Generally a new trial will not be granted merely to relitigate old matter. *In re Southern Land Title Corp.*, 310 F.Supp. 451 (ED La.1970) A rule 59(a) motion will not be granted to enable the moving party to present a different theory than he adopted at trial. *Rue v. Fuez Construction Co.*, 103 F.Supp. 499 (D.D.C.1952)

There are basically three grounds which permit the court to grant a new trial in a non-jury matter. The grounds are: manifest error of law or fact, and newly discovered evidence. 6A J. Moore, Federal Practice, ¶59.07 at 59-94 (2d ed. 1974).

None of these grounds has been advanced by the state nor has it presented any other reason why a new trial should be granted. Accordingly, the motion should be, and hereby is, *DENIED.*

I have carefully reviewed my findings and conclusions in this case in light of the state's motion. I am keenly aware of the diverging interests concerning the life or death of Ernest Benjamin Smith. My original opinion was not hastily prepared or lightly considered. I believe it struck the proper balance between the interests of the Petitioner and the Respondent. See Dix, Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to Prediction of Dangerousness, 55 Tex. L.Rev. 1343(1977); Sharpe, The Death Penalty Punishment Hearing, 41 Tex. B.J. 253(1978).

In reviewing my opinion and final judgment I do believe several minor corrections are in order. Therefore, the final judgment should be corrected in the following manner. A period should be inserted after the word "vacated". The following language should be stricken:

> "and this case is remanded to the Texas Court of Criminal Appeals with directions to order further proceedings at the trial court not inconsistent with this court's memorandum opinion."

At page six of the memorandum opinion the following language should be stricken:

> "and accordingly this case is remanded to the Texas Court of Criminal Appeals with directions to order further proceedings at the trial court not inconsistent with this opinion. *See Gardner v. Florida*, 430 U.S. 349, 362, (1977)

Footnote "10A" should be retained after the sentence which reads: "No constitutional error has been found with respect to the guilt phase of the trial."

Finally, the Court notes with some amazement the State's heated demand for an evidentiary hearing in this case. The State was presented with every opportunity to demand such a hearing before I entered my 28 page opinion. Not only did the State not request such a hearing, it was opposed to my granting one.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

DATE March 27, 1978

United States Court of Appeals
Fifth Circuit

No. 78-1839

Ernest Benjamin Smith,
Petitioner-Appellee

v.

W. J. Estelle, Jr., Director
Texas Department of Corrections,
Respondent-Appellant

OPINION

[Printed in Appendix to Petition for Writ of Certiorari at A-1 & A-30]

Supreme Court Of The United States

No. 79-1127

W. J. Estelle, Jr., Director
Texas Department of Corrections,

Petitioner

v.

Ernest Benjamin Smith,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

March 17, 1980

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1127

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

v.

ERNEST BENJAMIN SMITH,

Respondent.

Respondent Ernest Benjamin Smith, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53. Respondent's affidavit is attached hereto.

JOEL BERGER
Attorney for Respondent
Suite 2030
10 Columbus Circle
New York, New York 10019

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1127

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

v.

ERNEST BENJAMIN SMITH,

Respondent.

I, ERNEST BENJAMIN SMITH, being duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-titled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel was appointed to represent me at my trial in the 195th Judicial District Court of Dallas County, Texas, and on my appeal to the Texas Court of Criminal Appeals. In the instant federal habeas corpus proceeding I have been represented by volunteer counsel associated with the NAACP Legal Defense and Educational Fund, Inc.

5. I believe that I am entitled to the redress I seek in said cause, and thus far both a federal district judge and a unanimous panel of the Court of Appeals have agreed that I

am entitled to the redress I seek.

6. The nature of said cause is briefly stated as follows:

I was convicted in the 195th Judicial District Court of Dallas County, a trial court of the State of Texas, of capital murder, and was sentenced to die. I am being held under sentence of death at the Ellis Unit of the Texas Department of Corrections, Huntsville, Texas. My conviction and sentence were affirmed on February 18, 1976, rehearing denied July 14, 1976, by the Texas Court of Criminal Appeals. On March 7, 1977, this Court denied certiorari. 430 U.S. 922 (Justices Brennan, Marshall and White dissenting). However, on December 30, 1977, the United States District Court for the Northern District of Texas granted my federal habeas corpus petition to the extent of invalidating the sentence of death imposed upon me. 445 F.Supp. 647 (N.D. Tex. 1977); and on September 13, 1979, the United States Court of Appeals affirmed. 602 F.2d 694 (5th Cir. 1979). Both the district court and the court of appeals held that, due to errors committed during the course of my trial, the death sentence was imposed upon me in violation of my constitutional rights.

Ernest Benjamin Smith

ERNEST BENJAMIN SMITH

STATE OF TEXAS

COUNTY OF WALKER

The foregoing affidavit of Ernest Benjamin Smith was subscribed and sworn to before me this 3 day of February, 1980.

Notary Public

WALKER CO. TEXAS

MY COMMISSION EXPIRES 12-4-81

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1979

No. 79-1127

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

-v.-

ERNEST BENJAMIN SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

In The

Supreme Court of the United States

October Term, 1979

No. 79-1127

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

-v.-

ERNEST BENJAMIN SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's decision to grant habeas corpus relief based upon the affidavits submitted by both sides, since those affidavits did not reveal any material dispute of fact necessitating an evidentiary hearing.

2. Whether the particular circumstances surrounding Doctor Grigson's testimony at the penalty trial in this capital case deprived respondent of due process of law and resulted in the imposition of cruel and unusual punishment.

3. Whether the Fifth and Sixth Amendment rights recognized by the Court of Appeals within the context of the capital sentencing trial conducted in this case are inappropriate to the circumstances, in which the State had the burden of proving respondent's alleged probable future dangerousness

as the basis for a death sentence yet sought to meet that burden through respondent's own statements.

STATEMENT OF THE CASE

Petitioner's Statement of the Case describes its procedural history in the Texas courts and the courts below. The facts of the case are adequately set forth in the opinion of the Court of Appeals, appended to the certiorari petition, at A. 2-7, 9-13, 15-17, 18 and 23.

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DECISION TO GRANT HABEAS CORPUS RELIEF BASED UPON THE AFFIDAVITS SUBMITTED BY BOTH SIDES, BECAUSE THOSE AFFIDAVITS DID NOT REVEAL ANY MATERIAL DISPUTE OF FACT NECESSITATING AN EVIDENTIARY HEARING

A district court is not required to conduct an evidentiary hearing in every habeas corpus proceeding. The court may order the submission of affidavits by both sides as a means of narrowing the issues, to determine whether a hearing is necessary. 28 U.S.C. §2246 (1970); Rules Governing Section 2254 Cases in the United States District Courts, Rule 7; Wright, Procedure for Habeas Corpus, 77 F.R.D. 227, 244-45 (1978); see also Harris v. Nelson, 394 U.S. 286, 299 (1969). If the affidavits reveal no material disputes of fact, the court may rule as a matter of law without hearing live testimony. Blackledge v. Allison, 431 U.S. 63, 80-81 (1977); Browder v. Director, Illinois Department of Corrections, 434 U.S. 257, 266 n.10 (1978); Walker v. Johnston, 312 U.S. 275, 284 (1941).

The affidavits submitted by both sides in this case at the district court's request are in complete agreement that:

(i) respondent's trial attorneys never raised any question of respondent's competence to stand trial or his sanity, R. 84, 87, 89, 92;[1] (ii) the trial judge nonetheless asked Dr. Grigson to visit respondent for the sole purpose of satisfying the judge personally that respondent was competent to stand trial, R. 84, 87, 90, 91; (iii) the trial judge's request was made by oral communication, and no order or letter was written reflecting Dr. Grigson's appointment, R. 84, 86, 89, 92;[2] (iv) Dr. Grigson did not prepare any report of his findings, R. 85, 87, 90, 92; and (v) Dr. Grigson's letter to the trial judge summarizing his findings was not served upon defense counsel, but was merely placed in the court file by the judge, R. 84-85, 86-87, 90, 92.

One of respondent's attorneys additionally averred that "[u]ntil the time that Dr. Grigson took the stand nothing had been done or said that ever gave me any reason to believe that Dr. Grigson would be called to testify, or that there was anything material or relevant that he could testify to." R. 87. "His appearance at the trial was a complete surprise to me." R. 94. These statements were not disputed by the state's affidavit. Dr. Grigson's testimony at trial reveals that the prosecutor discussed the doctor's findings with him in advance of trial, App. 120,[3] asked him to testify, App. 122-23, and -- at least five days before the trial -- told Dr. Grigson

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1/ Numbers preceded by "R." refer to pages of the record before the Court of Appeals.

2/ As the Court of Appeals noted, whether or not the trial judge informally told defense counsel of the doctor's appointment is immaterial. See opinion of the Court of Appeals, certiorari petition at A. 9 n. 5 & n. 6.

3/ Numbers preceded by "App." refer to pages of the Appendix before the Court of Appeals.

approximately when he would be needed, App. 121, 122; yet at no time did the prosecutor amend his court-ordered witness list to advise defense counsel of his intentions. Thus, the undisputed facts fully support the conclusion of the courts below that the prosecutor deliberately used Dr. Grigson as a last-minute surprise witness. See opinion of the Court of Appeals, certiorari petition at A. 16-17.

II

THE PARTICULAR CIRCUMSTANCES SURROUNDING DOCTOR GRIGSON'S TESTIMONY AT THE PENALTY TRIAL IN THIS CAPITAL CASE DEPRIVED RESPONDENT OF DUE PROCESS OF LAW AND RESULTED IN THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

The Court of Appeals announced no new principle of Eighth or Fourteenth Amendment law in this case, but merely applied Gardner v. Florida, 430 U.S. 349 (1977), to invalidate a death sentence obtained through prosecutorial misconduct that deprived respondent of fair notice and an opportunity to defend:

> The defect which the Supreme Court identified in Gardner -- defense counsel's inability to challenge or answer the evidence on which the death sentence was based ... -- is conspicuous here as well. As a result Smith's sentencing hearing was at least as unreliable as the proceedings in Gardner. And the justifications for the unreliable procedures were far weaker here.

Opinion of the Court of Appeals, certiorari petition at A. 8-9.

Dr. Grigson's opinions at the penalty trial provided the principal basis for the death sentence imposed upon respondent. "Even a moderately well prepared defense attorney would have had some success in impeaching Dr. Grigson's testimony or offering an opposing view." Opinion of the Court of Appeals, certiorari petition at A. 11 n. 7. However, the prosecutor's surprise tactics, by effectively foreclosing any

scrutiny or rebuttal of Dr. Grigson's presentation, prevented respondent from "challeng[ing] the accuracy or materiality" of the State's evidence at the penalty phase. Gardner v. Florida, supra, 430 U.S. at 356.

Petitioner does not claim that prosecutors in Texas regularly engage in the practice of surprising the defense with last-minute expert witnesses at capital trials. Nor does petitioner cite to any conflicting decisions in which the states or other circuits have upheld death sentences obtained by this tactic. The Court of Appeals' application of Gardner to remedy an isolated instance of prosecutorial contrivance plainly does not merit review by this Court.

III

THE FIFTH AND SIXTH AMENDMENT RIGHTS RECOGNIZED BY THE COURT OF APPEALS WITHIN THE CONTEXT OF THE CAPITAL SENTENCING TRIAL CONDUCTED IN THIS CASE ARE APPROPRIATE TO THE CIRCUMSTANCES, IN WHICH THE STATE HAD THE BURDEN OF PROVING RESPONDENT'S ALLEGED PROBABLE FUTURE DANGEROUSNESS AS THE BASIS FOR A DEATH SENTENCE YET SOUGHT TO MEET THAT BURDEN THROUGH RESPONDENT'S OWN STATEMENTS

This case has nothing to do with the application of the Fifth and Sixth Amendments to psychiatric examinations performed in the context of inquiries into (i) competency to stand trial, (ii) criminal responsibility where the defense of insanity has been raised, or (iii) civil commitment. All of the cases cited by petitioner at page 7 of the certiorari petition arose in such contexts. The Fifth Circuit agrees with those decisions, see United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), which the court below properly held inapplicable to the circumstances of the present case. See opinion of the Court of Appeals, certiorari petition at A. 20-22.

Here, in the context of Texas' unusual capital sentencing procedure -- which authorizes a death sentence if but only if

the prosecution proves the defendant's probable future dangerousness -- respondent was visited shortly before his trial by Dr. James P. Grigson. Dr. Grigson, a Dallas psychiatrist who regularly testifies for the State in criminal prosecutions,[4/] spoke with respondent for about ninety minutes. And during that interview, respondent unknowingly provided the prosecution with the basis for the only testimony offered against him at his subsequent penalty trial. Respondent was not advised that the interview could have any adversarial purpose, that his comments to the doctor could and would be used to take his life, or that, in view of this awesome consequence, he had a right not to speak to the doctor.

The Court of Appeals properly held that under these particular circumstances, Mr. Smith's Fifth and Sixth Amendment rights were violated. In light of the use to which it was put, Dr. Grigson's interview was no routine competency examination, having only the benign and neutral purpose of insuring that a criminal defendant understands the charges and is capable of assisting in his defense. Nor was it a routine sanity examination, occasioned by a defendant's plea of insanity -- a very different situation, in which the defendant's silence might deprive the State of the only effective means of meeting an issue which the defendant himself has interjected into the case.[5/] Here, the State -- not respondent -- raised the issue of respondent's alleged future dangerousness. Under Texas law, the State had the burden of proving such dangerousness beyond a reasonable doubt in order to obtain

---

4/ See opinion of the Court of Appeals, certiorari petition at A. 12-13 n.7.

5/ The court below noted that if the defendant affirmatively seeks to offer psychiatric testimony at the penalty phase, he may well be deemed to have waived his privilege and be required to submit to an examination by the prosecutor's psychiatrist. See opinion of the Court of Appeals, certiorari petition at A. 21 & n. 15, A. 26.

a death sentence.[6] And the State sought to meet that burden exclusively through the defendant's own statements, unwittingly made without the slightest awareness that he would be assisting the prosecution's efforts to take his life.

The abuse of psychiatric testimony revealed by this record is so fundamentally unfair that the Texas Legislature has taken steps to remedy the problem. In H.B. No. 1163, effective August 27, 1979, the Legislature enacted Tex. Civ. Stat. art. 5561 h, which provides in pertinent part as follows:

> Sec. 2. (a) Communication between a patient/client and a professional is confidential and shall not be disclosed except as provided in Section 4 of this act.
>
> * * *
>
> Sec. 4. (a) Exceptions to the privilege in court proceedings exist:
>
> (4) when the judges [sic] finds that the patient/client after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's/client's mental or emotional condition or disorder....

1979 Vernon's Texas Session Law Service ch. 239, pp. 512-15 (emphasis added).[7] This statute, while not necessarily a complete corrective, will certainly inhibit the sort of exploitative practice that occurred here by placing defendants on notice that their statements to a court-appointed psychiatrist may be used against them. Supervening state legislation has therefore substantially reduced the significance of the decision below in the only jurisdiction to which it applies,

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6/ Texas Code Crim. Pro. Art. 37.071(c).

7/ The complete text of the statute is annexed hereto as Appendix A.

and has rendered the exercise of this Court's certiorari jurisdiction especially inappropriate. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, or reasonably believed by the patient/client so to be.

(b) "Patient/Client" means any person who consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and other drug addiction.

Confidentiality of information

Sec. 2. (a) Communication between a patient/client and a professional is confidential and shall not be disclosed except as provided in Section 4 of this Act.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient/client which are created or maintained by a professional are confidential and shall not be disclosed except as provided in Section 4 of this Act. Nothing in this section shall prohibit the disclosure of information necessary in the collection of fees for mental or emotional health services, as provided by Subsection (b)(5) of Section 4 of this Act.

(c) Any person who receives information from confidential communications or records as defined by Section 2, other than the persons listed in Subsection (b)(4) of Section 4 who are acting on the patient's client's behalf, shall not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(d) The prohibitions of this Act continue to apply to confidential communications or records concerning any patient/client irrespective of when the patient/client received services of a professional.

Privilege of confidentiality

Sec. 3. (a) The privilege of confidentiality may be claimed by the patient/client or by other persons listed in Subsection (b)(4) of Section 4 who are acting on the patient's/client's behalf.

(b) The professional may claim the privilege of confidentiality but only on behalf of the patient/client. The authority to do so is presumed in the absence of evidence to the contrary.

Exceptions to the privilege of confidentiality

Sec. 4. (a) Exceptions to the privilege in court proceedings exist:

(1) when the proceedings are brought by the patient/client against a professional, including but not limited to malpractice proceedings, and in any criminal or license revocation proceedings in which the patient/client is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) when the patient/client waives his right in writing to the privilege of confidentiality of any information, or when other persons listed in Subsection (b)(4) of Section 4 who are acting on the patient's/client's behalf submit a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient/client; or

(4) when the judges finds that the patient/client after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered

examination relating to the patient's/client's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's/client's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(b) Exceptions to the privilege of confidentiality, in other than court proceedings, allowing disclosure of confidential information by a professional, exist only to the following:

(1) to governmental agencies where such disclosures are required or authorized by law;

(2) to medical or law enforcement personnel where the professional determines that there is a probability of imminent physical injury by the patient/client to himself or to others, or where there is a probability of immediate mental or emotional injury to the patient/client;

(3) to qualified personnel for the purpose of management audits, financial audits, program evaluations, or research, but such personnel may not identify, directly or indirectly, a patient/client in any report of such research, audit, or evaluation, or otherwise disclose identities in any manner;

(4) to any person bearing the written consent of the patient/client, or a parent if the patient/client is a minor, or a guardian if the patient/client has been adjudicated incompetent to manage his personal affairs, or to the patient's/client's personal representative if the patient/client is deceased;

(5) to individuals, corporations, or governmental agencies involved in the payment or collection of fees for mental or emotional health services performed by a professional as defined in Section 1 of this Act; or

(6) to other professionals and personnel under the direction of the professional who are participating in the diagnosis, evaluation, or treatment of the patient/client.

Legal remedies

Sec. 5. A person aggrieved by a violation of this Act may petition the district court of the county in which the person resides, or in the case of a nonresident of the state, the district court of Travis County, for appropriate injunctive relief, and the petition takes precedence over all civil matters on the docket of the court except those matters to which equal precedence on the docket is granted by law. A person aggrieved by a violation of this Act may prove a cause of action for civil damages.

Severability clause

Sec. 6. If any portion of this Act is declared invalid or unconstitutional, it is the intention of the legislature that the other portions shall remain in full force and effect, and to this end the provisions of this Act are declared to be severable.

Emergency clause

Sec. 7. The importance of this legislation and the crowded conditions of the calendars in both houses create an emergency and an imperative public necessary that the constitutional rule requiring bills to he read on three several days in each house be suspended, and this rule is hereby sus-

pended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed by the House on April 25, 1979, by a non-record vote; House concurred in Senate amendments to H. B. No. 1163 on May 9, 1979, by a non-record vote; passed by the Senate, with amendments, on May 7, 1979: Yeas 31, Nays 0.

Approved May 17, 1979.

Effective Aug. 27, 1979, 90 days after date of adjournment.

WEIGHTS AND MEASURES—TESTS—FEES

CHAPTER 240

H. B. No. 1381

An Act relating to fees for testing instruments used in weighing and measuring.

Be it enacted by the Legislature of the State of Texas:

Section 1. Article 5728, Revised Civil Statutes of Texas, 1925, as amended, is amended [55] to read as follows:

Art. 5728. Fees; failure or refusal to pay; repairs; testing services; penalty

(a) The Commissioner of Agriculture shall collect fees for testing all weights, scales, beams and any kind of instruments or mechanical devices for weighing or measuring whenever he is required to make such tests under the provisions of this Chapter. The fee for testing gasoline, kerosene and diesel fuel pumps not to exceed Two Dollars ($2) for each pump tested; the test certificate or seal shall be attached to each gasoline, kerosene and diesel fuel pump; fee for testing scales up to nine hundred and ninety-nine (999) pounds not to exceed Two Dollars ($2) for each scale tested; fee for testing scales one thousand (1,000) pounds to four thousand nine hundred and ninety-nine (4,999) pounds not to exceed Five Dollars ($5) for each scale tested; fee for testing scales four thousand nine hundred and ninety-nine (4,999) pounds and over not to exceed Twenty Dollars ($20) for each scale tested. The fee for testing butane and propane metering devices not to exceed Twenty Dollars ($20) for each metering device tested. The fee for testing other metering devices with a delivery capacity of less than fifty (50) gallons per minute is Two Dollars ($2) for each metering device tested; the fee for testing those with a delivery capacity of fifty (50) gallons or more per minute but less than one hundred (100) gallons per minute is Five Dollars ($5) for each metering device tested; and the fee for testing those with a delivery capacity of one hundred (100) or more gallons per minute is Ten Dollars ($10) for each metering device tested. The fee for testing measuring devices located on raw milk storage tanks situated on farms up to four hundred (400) gallons not to exceed Ten Dollars ($10) for each tank tested; fee for testing measuring devices located on raw milk storage tanks situated on farms four hundred and one (401) gallons to six hundred (600) gallons not to exceed Fifteen Dollars ($15) for each tank tested; fee for testing mea-

55. Vernon's Ann.Civ.St. art. 5728.

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In The

Supreme Court of the United States

October Term, 1979

No. 79-1127

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

-v.-

ERNEST BENJAMIN SMITH,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, JOEL BERGER, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of (i) respondent's brief in opposition and (ii) respondent's application for permission to proceed in forma pauperis in the above case upon counsel for petitioner by depositing the same in the United States mail, first class mail, postage prepaid, addressed as follows:

Hon. Mark White
Attorney General of the
State of Texas
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Assistant Attorney General

All parties required to be served have been served. Done this 20th day of February, 1980.

JOEL BERGER
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10 Columbus Circle
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LEGISLATORS—INSURANCE COVERAGE—STATE PLAN

CHAPTER 238

H. B. No. 993

An Act relating to coverage of certain persons under the state employee insurance plan.

Be it enacted by the Legislature of the State of Texas:

Section 1. Section 13, Texas Employees Uniform Group Insurance Benefits Act (Article 3.50—2, Vernon's Texas Insurance Code), is amended by adding [53] Subsection (d) to read as follows:

(d) On application to the trustee and on arrangement for payment of premiums, and postage, a person who has at least eight years creditable legislative service, as defined in Chapter 352, Acts of the 50th Legislature, Regular Session, 1947, as amended (Article 6228a, Vernon's Texas Civil Statutes), on ending his or her service in the legislature, continues to be eligible for participation in the group insurance programs under this Act.

Sec. 2. The importance of this legislation and the crowded conditions of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed by the House on April 12, 1979: Yeas 99, Nays 31, 1 present, not voting; passed by the Senate on May 7, 1979: Yeas 31, Nays 0.

Approved May 17, 1979.

Effective Aug. 27, 1979, 90 days after date of adjournment.

MENTAL HEALTH—CONFIDENTIALITY OF INFORMATION—PROFESSIONAL CONSULTATION

CHAPTER 239 [54]

H. B. No. 1163

An Act relating to the confidentiality of certain information pertaining to the mental or emotional health of an individual; providing for injunctive relief and civil damages; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Definitions of this Act

Section 1. (a) "Professional" means any person authorized to practice medicine in any state or nation, or any person licensed or certified by

53. V.A.T.S. Insurance Code, art. 3.50—2, § 13, subsec. (d).

54. Vernon's Ann.Civ.St. art. 5561h, §§ 1 to 4.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-1127

* * *

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

* * *

BRIEF FOR THE PETITIONER

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-1127

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

ERNEST BENJAMIN SMITH,
Respondent

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

* * *

BRIEF FOR THE PETITIONER

* * *

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 602 F.2d 694 and is reproduced as appendix A to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Criminal Appeals for the Fifth Circuit was entered on September 13, 1979. Rehearing and rehearing en banc were denied on October 22, 1979. The Petition for Writ of Certiorari

was filed within ninety days after that final judgment denying rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Certiorari was granted on March 17, 1980.

QUESTIONS PRESENTED

I. WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BY THE USE OF PSYCHIATRIC TESTIMONY AT THE PUNISHMENT TRIAL ON THE ISSUE OF FUTURE DANGEROUSNESS.

II. WHETHER A DEFENDANT IN A CAPITAL MURDER TRIAL MUST BE ADVISED OF A RIGHT TO REMAIN SILENT; A RIGHT TO TERMINATE THE INTERVIEW; AND A RIGHT TO BE ASSISTED BY COUNSEL IN DECIDING WHETHER TO SUBMIT TO THE EXAMINATION BY A PSYCHIATRIST.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as Tex. Code Crim. Proc. Ann. art. 37.071(a), (b)(2) as set forth below.

The Fifth Amendment to the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

> twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Code Criminal Procedure

Article 37.071, sections (a) and (b)(2) are as follows:

> (a) Upon a finding that the defendant is

guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

* * *

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

* * *

STATEMENT OF THE CASE

The Crime

The facts of the offenses for which Respondent Smith was convicted and sentenced to death are as follows.

In the early morning hours of September 28, 1973, Respondent Smith, along with Howie Ray Robinson, entered a Sheppes Grocery Store in Dallas County, Texas. Since there were some customers in the store, they left and waited outside in a car along with George Holden. After the customers left, Smith and Robinson re-entered the store. Both were carrying firearms.

Robinson placed a package of lunchmeat and a jar of mustard on the counter while Smith held a gun on the cashier, William Moon, and said, "this is a holdup." Moon apparently made a motion to reach for something, possibly his wallet. Smith attempted to fire his gun but the gun misfired. He then shouted to Robinson either, "get him Howie" (Respondent's oral confession) or, "look out Howie" (Respondent's trial testimony). Robinson fatally shot Moon in the head. Smith walked behind the counter, took money and bills from the cash drawer, and got change from a cigar box below the counter. There was a pistol and holster on top of the cigar box and Smith also took those. They walked out of the store past a phone booth back to the car where George Holden was waiting. When they got into the car, Smith told Holden "man, we had to shoot somebody" (Smith's oral confession) and they proceeded to James Mitchell's apartment to divide the proceeds of the robbery. Smith, Robinson, and Holden each received approximately $200.00. Mitchell received $30.00 or $40.00 for allowing them to divide the money at his apartment.

Pretrial Proceedings

On October 7, 1973, Smith was given a Magistrate's Warning setting forth all of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). This Magistrate's Warning is required pursuant to Tex. Code Crim. Proc. Ann. art. 15.17 (Vernon). Counsel was appointed for Respondent on October 25, 1973. On October 25, 1973, Smith signed and agreed to a request for an interview by Officer C. E. Lewis, a police officer for the City of Dallas, Texas. At that time, Smith gave an oral confession to Officer Lewis enumerating the facts of the robbery and murder. This oral confession was introduced during the case in chief for the State. Prior to making the statement, Smith was again warned of his rights and waived them.[1]

---

[1]Oral statements are not generally admissible in the State of Texas. Tex. Code Crim. Proc. Ann. art. 38.22 (Vernon). However,

On January 4, 1974, the attorneys for Respondent filed a Motion to List State Witnesses. That motion was for the purpose of establishing the existence of any relationships between witnesses and prospective jurors. (Tr. 21, A. 4).[2] That motion was granted without qualification as to the witnesses the State expected to use on the guilt or innocence stage of the trial. However, as to the witnesses to be used by the State during the punishment stage of the trial, the motion was granted only as to those witnesses if known at that time. (Tr. 22, A. 5). On February 1, 1974, the State in open court announced that it would seek the death penalty in the trial of Smith. (Tr. 23).

At the request of the state trial judge, a psychiatrist, Dr. James P. Grigson, examined Smith in the Dallas County Jail on February 18, 1974. He mailed a letter summary of the psychiatric evaluation of Smith to the Judge on February 28, 1974. That summary stated that Smith was competent and sane and was a severe sociopath. The letter was placed in the court's file. (Tr. 24, A. 6).

A list of witnesses was given to the defense attorney and was filed with the court on March 11, 1974. On that same day, March 11, 1974, voir dire proceedings commenced in the trial of Ernest Benjamin Smith.

Petitioner's oral statement led to the discovery of the gun and holster taken during the robbery-murder. Therefore, pursuant to Article 38.22(3)(c) this oral statement was admissible as containing an assertion of fact that is found to be true in the finding of stolen property.

[2]For convenience, documents found in the transcript of the state court record will be referred to as "Tr.". Portions of the record in the Statement of Facts of the state court trial will be referred to as "S/F", portions of the record of the federal habeas corpus proceeding will be referred to as "R" and portions of the record found in the supplemental transcript of the federal habeas corpus proceeding will be referred to as "S.R.".

The Trial

The voir dire examination was concluded on March 25, 1974. On that date, counsel for Smith requested numerous subpoenas to be issued. Included among the subpoena requests was one for the "book in records — custodian, Dallas Sheriff's Office — record of visitation of Dr. Grigson to Ernest Ben Smith." (Tr. 62, A. 8). That subpoena was issued on March 25, 1974.

The evidence presented by the State in its case in chief showed that in the early morning hours of September 27, 1973, Officer L. C. Caudell answered a radio call to proceed to the Sheppes Grocery Store. At that time, he observed a victim lying on his back with his arms at his side in a pool of blood. (S/F 2464). There was a wound in the left temple from which blood and what appeared to be brain matter was oozing out. (S/F 2464). At the time he was discovered he was breathing "gasping as if trying to get his breath." (S/F 2464). There was a jar of mustard and a package of luncheon meat on the counter. (S/F 2467). Finger prints were subsequently lifted from those two items. (S/F 2476, 2477). The fingerprints were subsequently identified as belonging to Howie Ray Robinson (S/F 2560).

Officer C. E. Lewis testified that part of the investigation concerned locating a Smith & Wesson .38 caliber revolver which was known to have been in the Sheppes Store at the time of the robbery-murder. (S/F 2504). Officer Lewis requested an interview with Smith. Smith's rights were explained to him. Smith stated he understood his rights. Smith further stated that he had understood his warnings from the Magistrate when he had been arraigned, and that he desired to waive his rights. (S/F 2503-04). As a result of the conversation with Smith, Officer Lewis was able to recover the .38 caliber Smith & Wesson revolver and holster. Smith gave Officer Lewis an oral confession to the robbery and murder. (S/F 2507-11, 2527-34). On cross-examination, the following testimony was elicited:

Q: Your investigation of this case, has it convinced you that Ernest Benjamin Smith was telling the truth with regard to who shot the clerk in the store?

A: Yes, Sir.

Q: Alright. In other words, not necessarily going by what you say he told you; but by your other investigation of this matter, are you convinced that Howie Robinson or someone other than Ernest Benjamin Smith killed the grocer?

A: No, sir, I am not totally convinced.

Q: You are not totally convinced of it?

A: No, sir.

Q: But you are totally convinced as to the other things that he told you?

A: Yes, sir, I am.

Q: Did he tell you that he had tried to shoot the grocer?

A: Yes, sir, he did.

Q: Did he appear to be remorseful about that in any way?

A: I saw no signs of emotion at all.

Q: In other words, he just talked to you in a conversational tone such as you are talking now?

A: Just about, yes, sir.

Q: You're saying he never showed any remorse?

A: No, sir.

Q: Did he tell you any reason or give you any motive why he would be so free with his information

to you?

A: Yes, sir. He told me he didn't want to take this murder rap.

(S/F 2543-44)

This witness further stated on cross-examination that "he stated to me that his gun malfunctioned and that it did not go off at the time. I asked him if the gun was loaded. He said it was." (S/F 2546).

The State also established that the cause of death was a close-range gunshot to the head. (S/F 2572-74). The bullet which was removed from the victim was identified as being fired from a .22 pistol which had been previously introduced as State's Exhibit No. 20. (S/F 2581).

When the State rested its case in chief, the defense called Ernest Benjamin Smith who testified in his own behalf. (S/F 2583-2657). Smith was the only witness presented by the defense. In his testimony, he admitted the crime. He testified on cross-examination that he had no problem sleeping after the crime. (S/F 2652). He also testified, "I picked up the cigar box and gave it to Howie and I picked up the pistol and on the way out, well, some change was dropped and I picked that up because I went out after he [Robinson] did." (S/F 2647). Smith was also asked if Robinson ever motioned his pistol at Smith or directed him to do anything. Smith's response was "if he did, it wasn't my knowledge." (S/F 2598).

On rebuttal, the State presented testimony from James Mitchell that Smith asked Mitchell to use his apartment to "split the money." (S/F 2668). At that time, Smith admitted the robbery to Mitchell. (S/F 2670). Mitchell testified that he declined to allow Smith to divide the money in his apartment. (S/F 2670). The next witness called by the State was Andrew Swift, who testified he bought the stolen gun and holster from Smith (S/F 2682). At that time, Smith had another gun,

a nickel plated automatic, which he was also trying to sell. (S/F 2682).

The next two witnesses called in rebuttal by the State were Yolanda Lewis and Martha White. White identified Smith as being a man who displayed a gun in September of 1973 in the Stop & Go drive-in grocery store where she was employed. (S/F 2692). Lewis identified Smith as being a man who displayed a gun in September, 1973, in Lowe's Bar-B-Q where she was employed as cashier. (S/F 2696). That testimony concluded the trial on guilt. The jury's verdict was guilty of capital murder. (Tr. 117).

At the beginning of the punishment trial, the State rested subject to their right to reopen. (S/F 2768, A. 11). The defense first presented the testimony of Robert Terry Roy who testified he had given a gun to Smith with the understanding that Smith was to repair it. (S/F 2772). The next witness was Sarah Smith, Ernest Benjamin Smith's step-mother. (S/F 2776-79). Louise Smith, the aunt of Ernest Benjamin Smith was the final witness called by the defense. (S/F 2779-81).

The State then called Dr. James P. Grigson to the stand. The defense requested an opportunity to take him on voir dire examination before his testimony was presented to the jury. (S/F 2782, A.12). Dr. Grigson testified that he did not know he would be testifying until that day at approximately 2:30 p.m. (S/F 2787, A. 15). The first indication that Dr. Grigson had that he might testify in this case occurred after the jury had been selected. (S/F 2787, A. 15). He had, however, discussed with the prosecuting attorney the report of his findings, a summary of which had been filed with the court.

Dr. Grigson testified that he had examined approximately eight thousand persons who had been charged with criminal offenses. (S/F 2794, A. 19). He had performed a mental status examination on Ernest

Benjamin Smith at the request of the trial judge. (S/F 2794, A. 19). The mental status examination was divided by Dr. Grigson into five parts. The first part was labeled as "General Appearance and Behavior." (S/F 2796, A. 20). This was basically an evaluation of a person's physical appearance. (S/F 2796, A. 20). The second part of the examination was called "A Production of Thought." This portion of the examination dealt with the manner in which thoughts come out and how they related to each other. (S/F 2796, A. 20-21). The third part of the examination was "Affect or Mood." In this, the doctor judged facial expression, tone of voice, gestures and body movements to determine an emotional state. (S/F 2797, A. 21). The fourth part of the examination is "Content of Thought." This portion of the examination deals with historical information as well as ability to discuss pending criminal charges. (S/F 2797-98, A. 21). The fifth and final part of the examination is the "Sensorium," which Dr. Grigson testified concerns individual orientation. (S/F 2798, A. 22). The doctor stated that the five different parts together determine how an individual is functioning emotionally and mentally. (S/F 2798, A. 22).

In regard to Smith's emotional state, Dr. Grigson testified that he could find no feelings of remorse. (S/F 2799, 2802, 2817, 2820, A. 22, 24, 33, 35). Dr. Grigson found that Smith had a sociopathic personality disorder. (S/F 2801, A. 23). The doctor's prognosis was that Smith would continue his previous behavior and would do it again in the future. (S/F 2802, A. 24). After this testimony on direct examination, defense counsel performed a thorough cross-examination of the doctor. (S/F 2805-18, A. 26-34)(2820, A. 35).

The Appeal and Collateral Proceedings

The Texas Court of Criminal Appeals affirmed Respondent's conviction and sentence on February 18, 1976. *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App.

1976). (A. 37). At the time the court issued its affirmance, two judges filed dissenting opinions. (A. 48). However, on Motion for Rehearing, both judges withdrew their dissents. (A. 47).

Respondent Smith was formally sentenced to death on October 20, 1976, by the trial court. His execution was set for November 22, 1976. A Stay of Execution pending timely filing of a petition for writ of certiorari was granted by this Court on November 6, 1976. On March 7, 1977, this Court denied the petition for writ of certiorari. *Smith v. Texas*, 430 U.S. 922 (1977).

On March 22, 1977, Respondent Smith was again formally sentenced and the execution was scheduled for April 26, 1977. On April 18, 1977, Smith presented an application for writ of habeas corpus to the state trial court. On April 19, 1977, Smith presented an application for stay of execution to the Texas Court of Criminal Appeals. It was considered as an original writ of habeas corpus and denied in a written opinion on April 20, 1977. On April 21, 1977, Smith filed an application for stay of execution and an application for writ of habeas corpus in the United States District Court for the Northern District of Texas, Dallas Division. That application for stay of execution was granted on April 22, 1977. In Smith's application for writ of habeas corpus, he alleged, along with numerous other allegations, that "the introduction of the testimony of Dr. Grigson at Petitioner's trial violated his privilege against self-incrimination and his rights to fair notice and effective assistance of counsel." (R. 21-23, A. 72-73).

A preliminary order was entered by the United States District Judge on April 29, 1977. (R. 41-42, A. 88-89). That order directed the Attorney General's Office to file an answer not later than May 20, 1977, along with the entire transcript from Smith's state proceedings. The order also directed Smith to file not later than May 20, 1977, "a report detailing with specificity the factual disputes in this case." (R. 41, A. 88). The State's Answer

denied that the statements made by Smith to Dr. Grigson violated any Fifth Amendment privilege or Sixth Amendment right to have counsel present during the examination. In the Answer, the State also contended that counsel for Smith was aware of the results of the examination. (R. 50, A. 96). A letter was filed with the court on August 25, 1977, from counsel for Smith detailing the issues which he believed entitled him to relief without a hearing. However, the due process contention upon which the court ultimately granted relief was not one of these issues set forth in that August 25, 1977, letter. (S.R. 8-10, A. 104-6).

On October 6, 1977, the United States District Court Judge wrote a letter to one of Smith's counsel requesting answers to certain questions in the form of an affidavit. (S.R. 6-7, A. 107-8). By copy of that letter, the State was instructed to file controverting affidavits if they so desired. Affidavits, both in question and answer form and in narrative form, were filed by John F. Simmons and Howard Wilson, Smith's trial counsel, on October 12, 1977. (R. 84-90, A.109-116). On October 21, 1977, a controverting affidavit from R. T. Scales, the state trial judge, was filed with the court. (R. 90-92, A. 117-119). Judge Scales stated that he appointed Dr. Grigson to examine Smith. He further stated that "in all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial." (R. 91, A. 117). He further states "as best I recall, I informed John Simmons, the attorney for the Defendant, that I had appointed Dr. Grigson to examine the Defendant and that a written report was mailed to me." (R. 91, A. 118). Judge Scales's affidavit went on to recite, "I received a letter, dated 28 February 1974, from Dr. Grigson which stated that he had examined the Defendant on 18 February 1974. Such letter summarized Dr. Grigson's findings. Such letter was placed in the court records and was thereby made available to both the Defense and the State." (R. 92, A. 118).

On December 21, 1977, a letter was sent by defense counsel to the United States District Judge making reference to a conversation between the attorney and the Judge's law clerk. (S.R. 5, A. 120). In that letter, counsel stated he was furnishing an affidavit as to information requested and was hand-carrying a copy to an Assistant Attorney General in Dallas, Texas. In that affidavit of December 21, 1977, John F. Simmons set forth the reasons he did not make specific objection to Dr. Grigson's testimony and further stated he was surprised by that testimony. (R. 95, A.121).

Nine days later, December 30, 1977, the United States District Court entered a Memorandum Opinion and Final Judgment granting relief to Smith insofar as his death sentence. (R. 59, A. 124). That order left undisturbed the conviction. The reasons set forth in the Memorandum Opinion for vacating the death sentence were (1) a denial of due process in the manner in which the psychiatric testimony was presented; (2) a denial of a right to present complete testimony regarding mitigating factors on his personality; (3) a denial of the right to effective assistance of counsel from the previously found denial of due process in the presentation of testimony which hindered counsel in its duties; and (4) a denial of a Fifth Amendment right to remain silent at a psychiatric examination and the psychiatrist's failure to advise Smith of such right.

On January 9, 1978, the State filed a Motion for New Trial contesting the fact that no evidentiary hearing was conducted to resolve the factual issues or to resolve the conflict between the affidavit submitted by the trial judge and those submitted by the defense attorneys. That motion further pointed out that no objection was made in the trial court pursuant to any denial of Fifth or Sixth Amendment rights in the manner in which the psychiatric testimony was obtained or introduced. The Motion for New Trial was overruled on March 27, 1978.

On April 4, 1978, a Notice of Appeal to the United

States Court of Appeals for the Fifth Circuit was filed. In that appeal, the State raised, among other grounds, the contentions that there had been no denial of due process, that there was no Fifth Amendment privilege in the manner in which the psychiatric testimony was obtained and introduced in this case, and further, that counsel for Smith had waived any such privilege by failing to make a correct contemporaneous objection at trial.

The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court on September 13, 1979. *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979). Rehearing and rehearing en banc were denied on October 22, 1979. It is that opinion of the United States Court of Appeals to which this Writ of Certiorari is directed.

SUMMARY OF ARGUMENT

There was no due process violation either in the manner by which the psychiatric testimony was presented at Respondent's trial or in the nature of the testimony itself. The United States Court of Appeals, citing *Gardner v. Florida*, 430 U.S. 349 (1977), found that Respondent Smith was denied due process of law when the death sentence was imposed after psychiatric testimony had been presented in open court during the punishment stage of the trial. Unlike *Gardner*, the testimony in question was presented in open court with the opportunity for cross-examination and rebuttal. The facts in Respondent Smith's trial more closely align it with *Williams v. New York*, 337 U.S. 241 (1949).

The court below found that the denial of due process stemmed from the "surprise" to defense counsel when the psychiatric evidence was presented. This finding was based in part on defense counsel's objection that the name of the psychiatrist did not appear on the witness list. The facts, as developed at trial, reflect that the psychiatrist did not know he would testify until

approximately 2:30 p.m. on the day he was called. A report to the trial court from the psychiatrist summarizing his findings had been previously placed in the court file and was available to counsel for both the defense and the prosecution.

Counsel for Respondent did not object on the basis of due process or on the grounds of surprise, nor did they ask for a continuance pursuant to Texas procedure. Since the testimony was presented in open court and Respondent had the opportunity to object, to cross-examine and to present rebuttal evidence, there was no denial of due process by the presentation of this testimony.

It is essential that a sentencing jury in a capital murder trial have before it all possible relevant information as to the individual offender. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Evidence of the psychological characteristics of a criminal defendant has often been used in presentencing evaluations. Just as a trial court has wide latitude in making a sentencing determination, largely unlimited either as to the kind of information or the source of such information, so should the sentencing jury have access to such information.

The diagnosis of Respondent as a sociopath is not such "mis-information of constitutional magnitude" as to deny due process. There is both scientific and legal authority for an analysis of a sociopathic personality. The evidence introduced during the guilt trial, including Respondent's own testimony, is supportive of the diagnosis of the psychiatrist. That evidence showed that Respondent by his actions had displayed no remorse. The jury was entitled to evaluate the opinion testimony from the expert witness in making the sentencing determination.

It must further be noted that counsel for Respondent made no objection on the grounds now asserted at the time of trial. Under Texas law, all rights, even

constitutional rights, may be waived in a capital trial, except for the right of a jury trial. *Boulware v. State*, 442 S.W.2d 677 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 959 (1977). An objection to admission of evidence must be specific and must state the exact grounds of the objection. At no time did counsel for Respondent make an objection on the grounds of denial of confrontation or denial of opportunity to cross-examine the witness.

Further, the proper procedure when a defendant is surprised by testimony presented against him, is for the defendant to move for a continuance pursuant to Tex. Code Crim. Proc. Ann. art. 29.13 (Vernon). There must be a request to postpone or continue for the error to be considered. Otherwise, the defendant has waived his complaint of surprise. *Hays v. State*, 36 S.W.2d 1029 (Tex.Crim.App. 1931).

Since state law requires a specific objection and a motion for continuance if the objection is based on surprise, and since counsel had the opportunity to lodge such objection and move for continuance, the error, if any, in the presentation of the psychiatric testimony was waived.

The court below held not only that due process was violated, but also set forth certain evidentiary limitations on the presentation of psychiatric testimony for determination of punishment. Those limitations, based on the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966) are inapplicable to the presentation of testimony after the finding of guilt in a capital murder trial.

The issue of the incrimination of the defendant was resolved by the jury finding of guilt, which in this case was based at least in part on a voluntary oral confession and Respondent's testimony during the guilt stage of the trial. The Fifth Amendment privilege is against compelled self-incrimination. Therefore, since the incrimination is no longer an issue, the Fifth

Amendment privilege does not apply.

The jury determinations on punishment were not directed to the criminal culpability of Respondent, but were an evaluation of the character of Respondent as an individual in order that the appropriate punishment might be assessed. The testimony of the psychiatrist was not gained through a coerced confession to crime, nor were the statements of Respondent used to show his guilt of the offense charged.

Miranda v. Arizona, supra, defined a limited category of questioning during which warnings were judicially mandated. The limitation has been strictly applied to areas in which law enforcement officers have sought to gain incriminating evidence.

A psychiatric examination is not an inherently coercive interrogation in the same sense as an involuntary confession. Therefore, since the psychiatric examination was not performed by an agent of law enforcement, nor was the purpose of the examination to seek evidence of guilt, *Miranda v. Arizona* does not apply.

The Fifth Amendment privilege against self-incrimination is not self-executing. It must be invoked in a timely manner. Respondent waived his privilege against self-incrimination at the guilt stage of the trial. He had previously waived his privilege when he confessed orally.

Both Texas law and federal law require that the privilege be asserted or, if a defendant believes his privilege to be violated, that he make an objection at the time of trial. Absent the assertion of the privilege at the time of the communications and a correct contemporaneous objection at trial if privileged testimony is introduced, the privilege is waived.

During the litigation of the writ of habeas corpus, a hearing was never conducted to fully develop the factual

issues. The power of the federal courts under 28 U.S.C. §2254, is plenary, not appellate. There must be an opportunity for both the state prisoner and the state itself to be heard, to argue and present evidence, and to confront and cross-examine witnesses. The integrity of the state judicial system should not be overridden on the basis of an incomplete factual determination.

ARGUMENT AND AUTHORITIES

I. THERE WAS NO DUE PROCESS VIOLATION IN THE PRESENTATION OF THE PSYCHIATRIC TESTIMONY.

A. Due Process was not Violated by the Manner in Which the Testimony was Presented.

As stated in *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) *citing In Re Oliver*, 333 U.S. 257, 273 (1948):

> ...due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Respondent Smith contends, and the courts below held, that he was denied these due process rights in the manner in which the testimony of the court-appointed psychiatrist was presented during the punishment phase of Petitioner's capital murder trial. In reaching the conclusion that due process was denied, the Court of Appeals relied upon *Gardner v. Florida*, 430 U.S. 349 (1977). The facts evident from the record in this case distinguish it from the holding in *Gardner v. Florida*, *supra*, and more closely align it with the fact situation in *Williams v. New York*, 337 U.S. 241 (1949). Both *Gardner* and *Williams*, like the instant case, involved a capital conviction in which the defendant was sentenced to death.

In *Gardner*, the State of Florida relied upon the testimony at the trial on guilt and additionally introduced two photographs of the decedent on the punishment phase of the trial. Gardner introduced in mitigation, testimony of consuming a vast amount of alcohol and professed to have almost no recollection of the assaultive act itself. That testimony was sufficient to support at least one of the mitigating circumstances under the Florida statute. The jury, after evaluating all the evidence, recommended to the trial court that a sentence of life be imposed. It expressly found that the mitigating circumstances outweighed the aggravating circumstances.

Under Florida procedure, the trial court may reject the recommendation of the jury and assess punishment as it deems appropriate. The trial judge in *Gardner* requested a presentence investigation report. Based on that report, as well as the trial evidence, the court found that the felony "was especially heinous, attrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to wit: none." *Gardner v. Florida*, 430 U.S. at 353. A portion of that presentence investigation report was deemed to be confidential by the trial court and was never submitted to trial counsel for their inspection. Since this presentence report was the only item considered by the judge but not by the jury, it appeared that the report was of paramount importance in the trial court's decision to overturn the jury's advisory verdict. This Court, therefore, held that Gardner was denied due process of law when the death sentence was imposed "at least in part, on the basis of information which he had no *opportunity* to deny or explain." 430 U.S. at 362. (emphasis added).

In *Williams v. New York*, 337 U.S. 241 (1949), the trial court likewise assessed punishment at death overturning a jury's recommendation of life. Once again, the trial court relied strongly on a presentence report which had not been submitted to the jury.

However, unlike the proceedings in *Gardner v. Florida*, the trial court judge in *Williams v. New York*, stated in open court, before the defendant, the facts which, in his belief, justified a death sentence. The defendant was given the opportunity to make statements as to why sentence should not be imposed and his counsel was given the opportunity to make extended argument. Because the defendant was given an opportunity in open court to address the information contained in the presentencing report, this Court held that there was no denial of due process.

In the case at bar, after a finding of guilty to the aggravated offense of capital murder, the State presented the testimony of a psychiatrist, Dr. James P. Grigson, for the purpose of showing Respondent's mental status and his propensity to commit crime. This testimony was presented in open court before the jury and judge. The Defendant had the opportunity to cross-examine Dr. Grigson as to his conclusions, and further, the Defendant had the opportunity, if he so desired, to testify in his own behalf in order to rebut any of the conclusions made by the psychiatrist. In *Gardner v. Florida*, as well as in *Williams v. New York*, evidence of psychological analysis was contained in the presentence reports considered by the judges in assessing punishment. Here, not only were the conclusions of the psychological analysis presented in open court with the ability for cross-examination and rebuttal, but the psychiatrist himself was available to explain the basis for his conclusions.

The courts below found that the denial of due process stemmed in large part from the "surprise" to defense counsel when this evidence was presented. This was based in part on defense counsel's objection at the time the evidence was presented that Dr. Grigson's name had not appeared on a witness list. At the time the request was made for a witness list, the trial court granted it as to punishment witnesses only if known at that time. The request was made on January 4, 1974. (Tr. 21, A.5).

On March 11, 1974, a prospective list of witnesses was filed. (Tr. 25, A. 7). From Dr. Grigson's own testimony he knew only that he was going to be called as a witness at approximately 2:30 p.m. on the day he testified. (S/F 2787, A. 15).

After the letter was sent to the trial judge by Dr. Grigson, the assistant district attorney discussed the findings with the psychiatrist. (S/F 2887-2788, A. 15-16). At that time, the assistant district attorney did not indicate to Dr. Grigson that he would be called as a witness. (S/F 2788, A. 15). The first indication that Dr. Grigson had that he would probably be asked to testify was on Thursday, March 21, 1974, ten days after the witness list was filed. (S/F 2788, A. 15).

The failure to include Dr. Grigson's name on a witness list, especially if it was not known at the time such witness list was submitted that Dr. Grigson would be a witness, does not rise to the level of a constitutional violation. There is no general constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545 (1977). The testimony of Dr. Grigson did not encompass any information of an exculpatory nature which would have been beneficial to the defense. *See and compare, Brady v. Maryland*, 373 U.S. 83 (1963).

Dr. Grigson had been appointed by the trial court to examine the mental status of the Defendant. A letter summarizing his findings was sent to the trial court and was placed in the court's file. The letter was thus equally available to both the defense or the prosecution. (S/F 2785, A. 13). Respondent Smith himself surely knew of the interview. And contrary to the allegations of his counsel in affidavits submitted to the federal district court (R. 94-95, A. 121-122) that counsel attached no significance to the interview and subsequent summary report, counsel did request a subpoena for the records of the visit of Dr. Grigson to Respondent Smith in jail. (Tr. 62, A. 8). That subpoena request was filed and the subpoena was issued on the day prior to Dr. Grigson's

testimony. After counsel for Respondent Smith examined Dr. Grigson prior to his testimony, the court granted a recess of an hour and counsel agreed that an hour was acceptable. (S/F 2790, A. 17).

The only objection which counsel for Respondent Smith made at the time Dr. Grigson was called to testify was that Grigson's name did not appear on the witness list. He objected neither as to any due process violation nor on the grounds of surprise. It must be remembered that Respondent was represented by competent local counsel familiar with local procedure. *Henry v. Mississippi*, 379 U.S. 443 at 449, n.5 (1965).[3] Even if counsel was unaware of the nature of Dr. Grigson's testimony at the outset, when it became apparent that Grigson was going to offer an opinion as to a behavior prediction, an objection could have been lodged. Not only was no objection lodged, but counsel for the defense stated "he can ask for the man's opinion." (S/F 2803, A. 25). Due process does not guarantee perfect counsel and the federal district court in this case expressly "decline[d] to...[find counsel ineffective]." *Smith v. Estelle*, 445 F.Supp. 647, 658 n.16 (N.D.Tex. 1977)(A. 139).

The Court of Appeals reasoned that the failure of the prosecution to specifically inform Smith of the nature of Dr. Grigson's testimony and the fact that Grigson might testify denied him due process as much as a failure to present such testimony in open court subject to cross-examination and rebuttal. In support of this theory, the

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[3]Indeed, this was not the first capital murder trial in which counsel appointed for Respondent Smith had participated. In the month previous to this trial, both counsel had participated as defense counsel in the case of William David Hovila. *Hovila v. State*, 532 S.W.2d 293 (Tex.Crim.App. 1975). Official records of the Court of Criminal Appeals reflect that Dr. Grigson had testified that as a result of a mental status examination, he found Hovila to have a sociopathic personality disorder which would cause him to commit acts of violence.

court cited *Riggs v. United States*, 280 F.2d 750, 753-54 (5th Cir. 1960). In *Riggs*, testimony was presented by the prosecution for proof of offenses which were not alleged in the indictment and of which the defendant had no notice.

But Respondent Smith was on notice by indictment that he was charged with capital murder. Clearly, under the requirements of the statutory provisions, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon), the prosecution was required to prove "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. art. 37.07l(b)(2)(Vernon). If there was any doubt as to whether the State would truly seek a death sentence, it was eliminated by the State's formal notice of intention to seek the death penalty on February 1, 1974. (Tr. 23). Respondent Smith, having been fully aware of the charges against him, cannot claim surprise or lack of notice by the State's efforts to prove all necessary elements of those charges. *Spinkellink v. Wainwright*, 578 F.2d 582, 609 (5th Cir.), *cert. denied* 440 U.S. 976 (1978).

B. Due Process was not Violated by the Nature of the Psychiatric Testimony.

Due process and a fundamental respect for humanity require "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). This Court has recognized that information concerning the defendant's characteristics is vital for the jury to make a reasoned determination of sentence. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). In *Jurek v. Texas*, 428 U.S. 262, 276 (1976), the Court stated:

> The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

The capital murder statutes struck down as unconstitutional in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Bell v. Ohio*, 438 U.S. 637 (1978), limited the consideration of possible mitigating evidence as to the character of the individual offenders. A presentence report was requested by the trial judge in *Lockett*. The psychiatric and psychological reports described the defendant as not suffering from a mental deficiency, but one of the psychologists reported that her "prognosis for rehabilitation" if returned to society was favorable. 438 U.S. at 594. Since evidence of this nature did not fall within the statutorily enumerated mitigating circumstances, the court was unable to consider this diagnosis in determining sentence. Unlike Ohio, Texas allows consideration of such testimony, whether mitigating or aggravating. In fact, reversible error results if the defense is prohibited from presenting psychological evidence on lack of sociopathic personality traits and favorable prognosis for rehabilitation. *Robinson v. State*, 548 S.W.2d 63 (Tex.Crim.App. 1977).

The use of psychiatric evaluation as evidence in a capital sentencing determination has been widespread. In *Proffitt v. Florida*, 428 U.S. 242 (1976), evidence was introduced that Proffitt had an uncontrollable desire to kill and was dangerous. After receiving that testimony, the jury returned an advisory verdict recommending the sentence of death. Before assessing sentence, the trial judge ordered an independent psychiatric

evaluation. The trial judge sentenced Proffitt to death, finding as one of the aggravating facts a propensity to commit murder. Psychiatric evaluations were also ordered prior to sentencing in *Gardner v. Florida*, 430 U.S. 349 (1977); and *Williams v. New York*, 337 U.S. 241 (1949). Psychiatric testimony has also been used in *Witt v. State*, 342 So.2d 497 (Fla. 1977); *Alvord v. State*, 322 So.2d 533 (Fla. 1975); *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978); *Mason v. Commonwealth*, 254 S.E.2d 116 (Va. 1979); *Presnell v. State*, 243 S.E.2d 496 (Ga.), *rev'd and remanded* 439 U.S. 14 (1978). In all of those capital cases, a collateral attack is now proceeding based upon the Fifth Circuit opinion in *Smith v. Estelle*. The petitioners in those collateral proceedings contend that the absence of warnings prior to the psychological examination rendered the testimony invalid in violation of their constitutional rights.

Just as a trial judge has wide latitude in making a sentencing determination largely unlimited either as to the kind of information or the source of such information, so should the sentencing jury have access to such information. *See, United States v. Grayson*, 438 U.S. 41 (1978); *United States v. Tucker*, 404 U.S. 443, 446 (1972). The demeanor of the accused may legitimately be considered as a factor in sentencing. *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973).

The primary limitation on the reception of evidence for sentencing is "misinformation of constitutional magnitude." *United States v. Tucker, supra.* The psychiatric testimony introduced for sentencing at Respondent Smith's trial was not of this nature.

The diagnosis of an offender as a sociopath or psycopath[4] has been an accepted diagnosis of a certain

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[4]Although the terms "psycopath" and "sociopath" are used interchangeably in most technical literature, the term "sociopath" has been in greater favor for this personality type since the 1950s. The term "anti-social personality" has recently been substituted in place of "sociopath" by some commentators.

personality order for more than one hundred fifty years.[5] The principal trait of a sociopath is a lack of guilt or remorse for the acts he commits.[6] "The psycopathic personality seems to be a character type that everyone can describe at least in a general sense from everyday encounters." S. Yochelson & S. Samenow, *The Criminal Personality, Vol. I: A Profile For Change*, 96 (1976).

Although some commentators have criticized this type of testimony in regard to anti-social personalities,[7] the analysis made by Dr. Grigson is not without professional support.[8] Psychiatrists do testify in a large percentage of capital cases and their testimony may provide insight for the jury into the personality of the offender whose fate they must determine.[9] It has been suggested that a diagnosis of sociopathy may serve as a mitigating factor, not merely an aggravating factor, in a capital sentencing decision.[10] It must be remembered that the jury, as trier of fact, may accept or reject expert testimony like any other evidence. Texas juries have returned answers requiring a life sentence in cases where psychiatric testimony of future dangerousness

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[5]W. McCord & J. McCord, *The Psycopath: An Essay On The Criminal Mind*, (1964).

[6]Craft, *Psycopathic Personalities: A Review of Diagnosis, Aetiology, Prognosis, and Treatment*. Brit. J. Criminology, Vol. I, No. 3 (Jan. 1961).

[7]Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*. 5 Am. J. Crim. L. 151 (1977).

[8]Ayres & Holbrook, *Law Psychotherapy and the Duty to Warn: A Tragic Trilogy*? 27 Baylor L. Rev. 677, 695-705 (1975).

[9]*See*, Crump, *Capital Murder: The Issues In Texas*, 14 Hous. L. Rev. 531 (1977).

[10]Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L. J. 757, 789 (1978).

has been presented.[11]

The evidence upon which Respondent Smith had been found guilty was before the jury for consideration of punishment. That evidence supports both the verdict and the analysis of the psychiatrist.

Smith stated that he planned the robbery, and orally confessed to being the first to fire a gun. (S/F 2530).[12] Smith further testified that he stood there after the shooting and made no effort to help the victim although he was still alive. (S/F 2597, 2464). He coldly walked across the victim to get money, stopping long enough pick up coins which he had dropped. (S/F 2532, 2627-28, 2634-35). After the murder and division of the robbery

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[11]*State v. Milton James Anthony*, a capital murder conviction from Hill County, Texas, in which the defendant was convicted of capital murder during the robbery of a filling station. The attendant was beaten to death with coke bottles. Testimony of Dr. Grigson was introduced at the punishment trial.

State v. James Harold Lorance, a capital murder conviction from Lamar County, Texas, for murder during the burglary of a habitation. Psychiatric testimony was presented during the punishment trial.

State v. William Ray Walker, a capital murder conviction from Hunt County, Texas,now on appeal as Texas Court of Criminal Appeals No. 58,687. The offense was murder of a peace officer. Psychiatric testimony was presented during the punishment trial.

State v. Federico Losoya, a capital murder conviction from Bexar County, Texas, for the murder of a peace officer. Psychiatric testimony from hypothetical questions based on facts and evidence was presented at the punishment trial.

State v. Ernesto Granado Guillen, a capital murder conviction from Bexar County, Texas, for murder while committing rape. Psychiatric testimony was presented at the punishment trial.

[12]A sociopath "robs a store in a whim of the moment, not after careful consideration." W. McCord & J. McCord, *supra* n.5, at 10. Compare Smith's testimony at (S/F 2593, 2616).

proceeds, Smith went to the apartment of a woman who had invited him to a party. (S/F 2650). He had no trouble sleeping that night. (S/F 2650).[13] All of these factors, coupled with Smith's willing participation and leadership in the crime, leads to the reasonable conclusion that the murder was committed during the course of a calculated robbery for which crime Smith showed no remorse.[14] Dr. Grigson concluded on the basis of his examination and experience that there was no real treatment for a sociopathic personality such as Smith.[15]

The opinion testimony was subject to cross-examination and rebuttal, yet Smith himself did not take the stand to rebut the inference of lack of remorse. This type of testimony is the same type presented to courts in making sentencing evaluations. The need for information concerning the character of the offender is vital to the sentencing determination. *Gregg v. Georgia*, 428 U.S. 156, 190 (1976). Though professional authorities are divided on the ethical considerations and

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[13]W. McCord, & J. McCord, *supra* n.5 at 51: "The total pattern of the psycopath's personality differentiates him from the normal criminal. His aggression is more intense, his impulsivity more pronounced, his emotional relations more shallow. His guiltlessness, however, is the critical distinguishing trait. The normal criminal has an internalized, albeit warped, set of values. If he violates these standards, he feels guilt."

[14]The same factors showing lack of remorse are those factors which would cause a layman, by exercising common sense, to conclude that a person was "cold blooded" or "remorseless." The technical requirements of psychiatric training do not require the abandonment of common sense.

[15]O. Kernberg, *Borderline Conditions and Pathological Narcissism*, (1975).

"The anti-social personality may be considered a subgroup of the narcissistic personality." *Id.*, 18.

"Anti-social personalities in a strict sense have the worst prognosis for any kind of psychological treatment." *Id.*, 139.

validity of the testimony of future dangerousness,[16] there is no showing that the opinion testimony of the psychiatrist in this case contained "misinformation of constitutional magnitude" or that the testimony itself constituted a denial of due process.

C. The Error, if any, in the Admission of the Psychiatric Testimony, was Waived by Counsel's Failure to Object on the Specific Grounds of Surprise or Denial of Confrontation and Cross-Examination.

Under Texas law, all rights, even constitutional rights, may be waived in a capital trial, except for the right of jury trial. Tex. Code Crim. Proc. Ann. art. 1.14 (Vernon); *Boulware v. State*, 442 S.W.2d 677 (Tex.Crim.App. 1976), *cert. denied* 430 U.S. 959 (1977). An objection to admission of evidence must be specific and must state the exact grounds of the objection. *Mutscher v. State*, 514 S.W.2d 905, 915 (Tex.Crim.App. 1974), *citing* 5 Tex.Jur. 2d, *Appeal and Error - Criminal Cases*, §41 at 68 (1959). A specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. A specific objection is also required to afford opposing counsel an opportunity to remove the basis for the objection or supply other testimony. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex.Crim.App. 1977).

The constitutional right of a defendant to confrontation and the right to cross-examine the witnesses against him may be waived. *Griffith v. State*, 391 S.W.2d 428 (Tex.Crim.App. 1965); *Villareal v. State*, 214 S.W.2d 464 (Tex.Crim.App. 1948). At no time did counsel for Respondent Smith make an objection on the grounds of denial of confrontation or denial of opportunity to cross-examine the witness. Therefore, pursuant to state law, that objection is waived.

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[16]Dix, *supra* n.7.

Although Respondent Smith's Motion in Limine as to witnesses not on the March 11, 1974, witness list, was granted, such a motion is subject to reconsideration by the court throughout the course of the trial. *Norman v. State*, 323 S.W.2d 669 (Tex.Crim.App. 1975). A motion in limine may not be enforced to exclude properly admissible evidence. *Id.* The proper procedure when a defendant is surprised by testimony presented against him, is for the defendant to move for a continuance pursuant to Tex. Code Crim. Proc. Ann art. 29.13 (Vernon).[17] If a motion for continuance based on Article 29.13, is not made at time of trial, a defendant cannot urge on appeal that he was surprised. *Hays v. State*, 36 S.W.2d 1029 (Tex.Crim.App. 1931). There must be a request to postpone or continue for the error to be considered. Otherwise, the defendant has waived his complaint of surprise. *Hays v. State, id.*; *Alsup v. State*, 210 S.W. 195, 196 (Tex.Crim.App. 1919); *Knight v. State*, 144 S.W. 967, 977-78 (Tex.Crim.App. 1912).[18]

> It is even more important, however, that we follow the demands of procedural rules set down in our criminal code and the decisions of this Court. Without the consistency and predictability which result from such a policy, attorneys could not act with certainty to protect the interests and rights of clients, nor could defendants be assured of a fair and equal administration of justice.

Jones v. State, 501 S.W.2d 677, 679 (Tex.Crim.App. 1973).

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[17]Formerly, Tex. Code Crim. Proc. Ann. art. 551 (1925).

[18]*Cf. Novak v. State*, 384 S.W.2d 140 (Tex.Crim.App. 1964); *Crawford v. State*, 305 S.W.2d 362 (Tex.Crim.App. 1957). Unless there is a motion for continuance based on the absence of a witness, any complaint alleged as to an absent witness cannot be considered.

Respondent Smith was represented by competent local counsel familiar with local procedure. *Henry v. Mississippi*, 379 U.S. 443 at 449, n.5. Absent a correct contemporaneous objection, on the grounds now asserted, the error, if any, is waived. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Even if counsel were unaware of the nature of Dr. Grigson's testimony at the outset, when it became apparent that Dr. Grigon was going to offer an opinion as to a behavior prediction, an objection could have been lodged. Not only was no objection lodged, but counsel for the defense stated "he can ask for the man's opinion." (S/F 2803, A.25).

Since state law requires a specific objection and a motion for continuance if the objection is based on surprise, and since counsel had the opportunity to lodge such objection and move for continuance, the error, if any, in the presentation of the psychiatric testimony was waived.

II. THERE WAS NO VIOLATION OF RESPONDENT SMITH'S FIFTH AND SIXTH AMENDMENT RIGHTS IN THE TESTIMONY EVALUATING HIS MENTAL STATUS.

A. The Evidentiary Limitations of *Miranda v. Arizona*, 384 U.S. 436 (1966) are Inapplicable to the presentation of Testimony for Determination of Punishment.

The psychiatric testimony was presented in open court after Ernest Benjamin Smith had been found guilty of capital murder during the course of committing robbery. The issue of his incrimination was resolved by that jury finding, which in this case was based at least in part on a voluntary oral confession and Smith's testimony during the guilt stage of the trial.

The State, while respecting the "inviobility of the

human personality,"[19] is nonetheless entitled, indeed mandated, to present to the sentencing jury evidence relevant to the character of the individual offender. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). The punishment must be appropriate for the offender, not merely the crime. *Roberts v. United States*, 48 U.S.L.W. 4370, (U.S. April 15, 1980) (No. 78-1793); *Williams v. New York*, 337 U.S. 241, 247 (1949). If " 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come' ", *United States v. Grayson*, 438 U.S. 41, 50 (1978), *quoting United States v. Tucker*, 404 U.S. 443, 446 (1972), then surely a sentencing jury must be allowed to consider the same type of information if deemed admissible and relevant by the trial judge. *See also*, Fed. Rules Crim. Proc. Ann. rule 23 (West).

The Fifth Amendment addresses only a relatively narrow scope of inquiry. "Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise." *Garner v. United States*, 424 U.S. 648, 655 (1976). The privilege is against compelled self-incrimination. By its very definition, incrimination is complete once guilt has been adjudicated.[20] Therefore,

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[19]*Miranda v. Arizona*, 384 U.S. 436, 460 (1976) "...the constitutional foundation underlying the privilege is the respect a government - state or federal - must accord to the dignity and integrity of its citizens."

[20]Webster's New International Dictionary of the English Language, 1260 (2d ed. unabr. 1957) "Incriminate...To charge with a crime or a fault; to criminate; to accuse..."

Black's Law Dictionary, 690, 691 (5th ed. 1979) "Incriminate. To charge with a crime; to expose to an accusation or charge of crime;..."

"Incriminating evidence. Evidence which tends to establish guilt of the accused or from which, with other evidence, his or her guilt may be inferred."

since the incrimination is no longer at issue, the Fifth Amendment privilege does not apply.

The right to silence described in *Miranda v. Arizona*, 384 U.S. 436 (1966) "derives from the Fifth Amendment and adds nothing to it." *Roberts v. United States, supra* at 4372. The *Miranda*-type warnings set forth by the United States Court of Appeals expanded the evidentiary prophylactics of *Miranda* into an area not clearly protected by the Fifth Amendment. The decisions of this Court have established only that self-incriminating statements obtained during custodial interrogation in violation of the rules set forth in *Miranda v. Arizona, supra*, may not be admitted against the accused, at least during the State's case in chief. *Fare v. Michael C.*, 442 U.S. 707, 718 (1979).

The Texas Court of Criminal Appeals has held that testimony of a psychiatrist, based upon his examination of a defendant, and introduced in the punishment stage of a capital murder trial does not violate the defendant's rights against self-incrimination. *Garcia v. State*, 581 S.W.2d 168 (Tex.Crim.App. 1979); *Von Byrd v. State*, 569 S.W.2d 833 (Tex.Crim.App. 1978), *cert. denied*, 441 U.S. 967 (1979); *Shippy v. State*, 556 S.W.2d 246 *Livingston v. State*, 542 S.W.2d 655 (Tex.Crim.App. 1976), *cert. denied* 431 U.S. 933 (1977).

Smith was found guilty by a jury after waiving his Fifth Amendment privilege against *self-incrimination.* The questions submitted to the jury on punishment were not directed to the criminal culpability of Smith, but were a focusing guide for the jury in the evaluation of the character of Smith as an individual in order that the appropriate punishment might be assessed. *Jurek v. Texas*, 428 U.S. 262 (1976). It was the characteristics, both aggravating and mitigating, of Smith as a convicted offender which were of moment, not the issue of his guilt.

The testimony of the psychiatrist as to Smith's

statements to him was not "the cruel simple expedient" of compelling *a confession to crime*, nor were the statements of the defendant used to show his guilt of the offense charged. *See, Chambers v. Florida*, 309 U.S. 227 (1940). Therefore, there was no privielge to be violated, and correspondingly, there was no entitlement to the evidentiary protections of *Miranda v. Arizona, supra.*

B. The Psychiatric Examination was not a Custodial Interrogation Within the Meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966).

In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), this Court defined a limited category of questioning during which warnings were judicially mandated.

> By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

This limitation has been strictly applied to areas in which *law enforcement officers* have sought to gain incriminating evidence from a defendant or one suspected of criminal acts. *Roberts v. United States, supra* at 4372; *Beckwith v. United States*, 425 U.S. 341 (1976); *Michigan v. Tucker*, 417 U.S. 433 (1974).

The interview of Smith by Dr. Grigson was not a coercive law enforcement interrogation. The psychiatrist was court-appointed to examine the mental status of Smith. He was not acting as an agent of the State to obtain self-incriminating evidence by subterfuge or trickery. His conclusions were available to both parties.

In areas such as this psychiatric examination, where the State is not deliberately seeking to avoid the burdens of independent investigation, there is no circumvention of the constitutionally mandated policy of adversary

criminal proceedings. *Garner v. United States*, 424 U.S. 648, 656 (1976).

A psychiatric examination has been held to be not inherently coercive in the same sense as an involuntary confession. *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976). Generally, the context in which a Fifth Amendment privilege has been asserted as to a psychiatric examination is in proof of sanity at the time of the offense or competency to stand trial. In the case of sanity, the proof of the essential element of *mens rea* is at issue. The purpose and objective of a mental examination is not to obtain facts concerning a defendant's participation in the criminal act, but to obtain facts concerning a defendant's character. *United States v. Cohen, supra; United States v. Albright*, 388 F.2d 719 (7th Cir. 1968). Although it has been suggested that *Miranda* warnings are applicable to statements bearing on "intent," *Thornton v. Corcoran*, 407 F.2d 695, 700 (D.C.Cir. 1969), proof of "intent" in the case at bar had already been established.

The theory that the psychiatric examination is a gathering of "real or phsycial evidence" upon which an expert opinion is based is more plausible. In *United States v. Baird*, 414 F.2d 700, 709 (2nd Cir. 1969), it was held:

> The statements which the defendant makes to the psychiatrist may be as vital for diagnosis as an X-ray or blood test may be to a physician in another context...therefore even though they are verbal, they may be considered as 'real or physical evidence' rather than communications' or 'testimony' within the meaning of *Schmerber v. California*, 384 U.S.757 (1966).

The psychiatric evaluation is based on physiological responses as well as verbal responses. As in cases where blood is analyzed, or the quality of a voice is assessed, the underlying communications, both verbal and

nonverbal, are used as a basis upon which the psychiatrist formulates his opinion. *See, Schmerber v. California*, 484 U.S.757 (1966); *United States v. Wade*, 488 U.S. 218 (1967); *United States v. Dionisio*, 410 U.S. 1 (1973). The evidence is not "used for the testimonial or communicative content of what was to be said." *United States v. Dionisio, supra*, at 7.

The psychiatric examination was not performed by an agent of law enforcement, nor was the purpose of the examination to seek evidence of guilt. Therefore, *Miranda v. Arizona*, does not apply.

C. The Fifth Amendment Privilege Against Self-Incrimination is not Self-Executing.

The privilege against self-incrimination must be invoked in a timely manner. *Roberts v. United States, supra*, at 4372, *citing Garner v. United States*, 424 U.S. 648, 653-55 (1976); *United States v. Kordel*, 397 U.S. 1, 7-10 (1970); *United States v. Mandujano*, 425 U.S. 564, 574-75 (1976)(opinion of Burger, C.J.); *id.*, at 591-94 (Brennan, J., concurring in the judgment).

As in *Roberts*, the Respondent should have asserted his Fifth Amendment claim at the time of the sentencing trial. Instead, he made no assertion of his privilege at any time during these proceedings. Respondent had affirmatively waived his rights at the time he gave the confession to law enforcement officials. He again waived his privilege against self-incrimination at the time he testified in his own behalf.

Texas requires that the privilege be asserted or it is considered waived. *Crestfield v. State*, 471 S.W.2d 50 (Tex.Crim.App. 1971), *cert. denied* 406 U.S. 917 (1972). An objection on the precise claim asserted must be made at the time the testimony is offered. *Boulware v. State*, 542 S.W.2d 677 (1976) *cert. denied*, 430 U.S. 959 (1977); *Crestfield v. State, supra*. A failure to timely object to the

voluntariness of a statement waives the error, if any. *Gibson v. State*, 516 S.W.2d 406 (Tex.Crim.App. 1974); *Shumake v. State*, 502 S.W.2d 758 (Tex.Crim.App. 1973); *Taylor v. State*, 489 S.W.2d 890 (Tex.Crim.App. 1973); *Harris v. State*, 465 S.W.2d 175 (Tex.Crim.App. 1971).

Respondent was required to assert his privilege at the time which he perceived his rights were violated. Rather, Respondent did not raise this claim of self-incrimination until he filed an application for writ of habeas corpus, three years after the testimony was admitted.

Absent an assertion of the privilege at the time of the communications, *Roberts v. United States, supra*, and a correct contemporaneous objection at trial, *Wainwright v. Sykes*, 433 U.S. 72 (1977), the privilege is waived and any trial error accompanying introduction of testimony relating to the communications is not preserved, Tex. Code Crim. Proc. Ann. art. 1.14 (Vernon).

III. THE FEDERAL DISTRICT COURT ERRED IN GRANTING THE WRIT OF HABEAS CORPUS WITHOUT REQUIRING PROOF FROM THE HABEAS PETITIONER.

28 U.S.C. §2254, requires that the petitioner for habeas corpus relief in federal court prove his wrongful restraint. The lower federal courts are in a position to provide a full and complete record upon which a meaningful accommodation between state criminal law enforcement and a state prisoner's constitutional rights may be based. *Fay v. Noia*, 372 U.S. 391 (1963). The mandate of Congress in designing the Rules Governing Federal Habeas Corpus Procedures was to afford a trial-type proceeding in federal court for state prisoners aggrieved by unconstitutional detention. *Townsend v. Sain*, 372 U.S. 293 (1973). The history of the writ is not a creation providing appellate review, but rather is the

power of inquiry which is plenary. 372 U.S. at 311-12. In this case, no hearing was ever conducted as to the due process claims or as to any Fifth Amendment privilege claims. There must be an opportunity for both the state prisoner and the State itself to be heard, to argue and present evidence, and to confront and cross-examine witnesses.

The affidavit filed by the state trial court judge set forth the belief by the judge that defense counsel were aware of the examination of Respondent Smith. This contradicted the statement in the affidavits of defense counsel when they stated they were never aware of such appointment. During the course of a fact finding hearing, counsel for the State would have had the opportunity to cross-examine counsel for Smith as to their knowledge of the examination. They could have been asked whether the Respondent himself ever told them that he had been examined by the psychiatrist and their purpose in requesting records of Dr. Grigson's visit. Moreover, cross-examination could have explored counsel's familiarity with psychiatric examination and evidence, as well as their specific experience in presenting direct testimony from Dr. Grigson and cross-examining Dr. Grigson in previous trials. A fact finding hearing could also encompass the exact nature of the statements made to Dr. Grigson by Respondent Smith. Since a hearing was not conducted, there was no opportunity to fully develop these aspects of the record.

The power of a federal district court to conduct a hearing must not be used to "subvert the integrity of the criminal justice system." *Townsend v. Sain*, 372 U.S. 293, 318 (1963). If, as a matter of law, this Court finds a due process right beyond that afforded to Respondent on the face of the record or a Fifth Amendment privilege as to a psychiatric examination, then this cause should be remanded to the federal district court for full development of the underlying factual basis of those claims. Without such opportunity for a hearing, to present evidence and cross-examine witnesses, the basic

interest of comity between state and federal courts is subverted. The integrity of the state judicial system should not be overriden nor cast aside on the basis of an incomplete factual determination.

CONCLUSION

For these reasons, the Petitioner respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *Petitioner,*

v.

ERNEST BENJAMIN SMITH, *Respondent.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *Petitioner,*

v.

ERNEST BENJAMIN SMITH, *Respondent.*

On Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 602 F.2d 694 and appears as Appendix A to the certiorari petition. The opinion of the United States District Court for the Northern District of Texas is reported at 445 F.Supp. 647 and appears at A. 124.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

The judgment of the court of appeals was rendered on September 13, 1979. Rehearing en banc was denied on October 22, 1979. A timely certiorari petition was filed, and on March 17, 1980, this Court granted certiorari. _____ U.S. _____, 48 U.S.L.W. 3602.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the following statutes of the State of Texas:

Tex. Code Crim. Pro. Art. 37.071. Procedure in capital case.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Former Texas Penal Code, Article 1257(a)-(c). Punishment for murder.[1]

(a) Except as provided in Subsection (b) of this Article, the punishment for murder

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[1] Article 1257, under which respondent was prosecuted, was superseded by Section 19.03 of the new Texas Penal Code, Acts 1973, 63rd Leg., Ch. 399, eff. January 1, 1974. "Section 19.03 of the new Penal Code is substantially similar to Article 1257 of the old code." *Jurek* v. *State*, 522 S.W.2d 934, 936-937 n.1 (Tex. Crim. App. 1975).

shall be confinement in the penitentiary for life or for any term of years not less than two.

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense.

QUESTIONS PRESENTED

1. Whether the prosecution's deliberate use of Doctor Grigson as a surprise witness at the penalty trial in this capital case deprived respondent of due process of law and resulted in the imposition of cruel and unusual punishment.

2. Whether the Fifth and Sixth Amendment rights recognized by the court of appeals are inappropriate within the context of the capital sentencing trial conducted in this case, where the State had the burden of proving respondent's alleged probable future dangerousness as the basis for a death sentence yet sought to meet that burden through respondent's own statements.

3. Whether the court of appeals correctly affirmed the district court's decision to grant habeas corpus relief based upon the state trial record and affidavits submitted by both sides, since the record and affidavits did not reveal any material dispute of fact necessitating an evidentiary hearing.

STATEMENT OF THE CASE

We regret that due to substantial distortions, inaccuracies and omissions in petitioner's statement, we are constrained to set forth a full statement of the case on behalf of respondent. See Rule 40.3.

A. Proceedings In The State Courts

1. The Guilt Trial

Respondent Ernest Benjamin Smith, Jr., a black American, was convicted and sentenced to die as a result of a convenience store robbery in Dallas, Texas, in which the clerk of the store was shot. The victim was killed by one Howie Ray Robinson, with whom respondent participated in the robbery; Mr. Smith himself did not fire a shot. S/F 2532, 2597.[2]

During the robbery respondent was in possession of a defective .32 caliber automatic pistol which he knew was incapable of being fired. S/F 2590-91, 2594, 2770-73. Robinson had a .22 caliber gun supplied by a third participant, George Holden, S/F 2528, 2534, 2595, who remained outside in a getaway car, S/F 2529, 2533. After waiting for two customers to leave the store, S/F 2530, 2595, 2617, Robinson picked out some lunch meat and a jar of mustard and placed them on the clerk's counter, S/F 2530.[3] Respondent and Robinson then

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[2] Numbers preceded by "S/F" refer to pages of the Statement of Facts before the Texas Court of Criminal Appeals.

[3] Robinson's fingerprints were subsequently found on these items. S/F 2476-78, 2560.

pulled the guns and announced a hold-up to the clerk behind the counter. *Ibid.*

At this moment, the clerk suddenly reached for something behind his jacket in the middle of his back. S/F 2530, 2596, 2618-19, 2624. (The clerk carried a gun when working, S/F 2450-51, and had access to a second gun, a .38 caliber Smith and Wesson, normally kept under the counter by a co-worker, S/F 2444, 2450, 2457, 2459-60.) Respondent, believing that the clerk might be reaching for a pistol, S/F 2596, 2619, 2624, called out to Robinson. The State's evidence is in conflict as to Mr. Smith's exact words. At the penalty trial Dr. James P. Grigson quoted him as having recalled saying "Watch out, Howie. He's got a gun" or words to that effect. S/F 2808.[4] At the guilt trial police officer C.E. Lewis, who obtained an oral confession from respondent at the Dallas County Jail, testified that respondent recalled saying "Get him, Howie." S/F 2530.[5]

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[4] Respondent himself testified that these were his words. S/F 2596, 2600, 2601.

[5] Officer Lewis visited respondent at the jail on October 25, 1973, S/F 2500, two weeks after respondent was arrested, S/F 2564-65. The ostensible reason for this visit was that Officer Lewis was seeking to recover the .38 caliber gun customarily kept in the store, which was missing. S/F 2504-05, 2442, 2444. On the same day that this interview took place, counsel was appointed for respondent. See transcript on appeal to the Texas Court of Criminal Appeals (hereinafter "Tr.") at 5.

Officer Lewis testified that he warned respondent of his rights, S/F 2503-04, and proceeded to obtain the oral confession. Respondent's motion to suppress was denied. S/F 2517-19, Tr. 74-75.

No written confession was introduced in this case, and there is no evidence that Officer Lewis ever prepared one for Mr. Smith's signature.

The evidence is also in conflict as to whether respondent at this time unsuccessfully attempted to fire his defective gun at the clerk. S/F 2530, 2620-21, 2808. There is, however, no evidence that respondent actually fired a shot, and no dispute that the clerk was killed by a .22 caliber pistol fired by Howie Ray Robinson. S/F 2532, 2534, 2574, 2582.[6] The Dallas District Attorney's office has consistently prosecuted Robinson as the triggerman in this homicide. See *Robinson* v. *State,* 550 S.W.2d 54 (Tex. Crim. App. 1977).[7] And at every stage

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[6] See also S/F 2546, testimony of Officer Lewis: "No one ever said that Ernest Benjamin Smith did kill the grocer."

[7] In Robinson's case the State has consistently relied upon the testimony of George Holden, driver of the getaway car and owner of the murder weapon, that Robinson was carrying the .22 caliber pistol when he returned to the car and that Robinson twice admitted to shooting the victim in the head (see 550 S.W.2d at 55-56). Holden, a convicted felon (*id.* at 60, 61) whom respondent described as the organizer of the robbery (S/F 2588, 2595, 2606, 2643), did not testify at respondent's trial.

The Texas Court of Criminal Appeals reversed Robinson's initial conviction and death sentence because the Dallas prosecutor, who had offered Holden a sentence of probation in return for his testimony (550 S.W.2d at 56), attempted to bolster Holden's account by bringing out the fact that Holden had passed a lie detector test (*id.* at 58). At his second trial Robinson was again convicted and sentenced to die, but the judgment was set aside by the state trial court due to the prosecutor's use of inadmissible evidence. *State* v. *Robinson,* Cause No. C-74-3195 PNQ, 204th Jud. Dist. Ct. of Dallas Co., proceedings of November 2, 1977. At his third trial Robinson was once more convicted and sentenced to die, but that judgment was set aside by the state trial court due to the loss of portions of the court reporter's notes. *State* v. *Robinson, supra,* proceedings of March 7, 1980. A fourth trial is pending.

of this federal habeas corpus proceeding, the State has conceded that it was Robinson who killed the victim. Brief for Petitioner Estelle, p. 5; petition for rehearing en banc in the court of appeals, p. 4; brief in the court of appeals, p. 7; answer to the habeas corpus petition, A. 91.

After Robinson fired his pistol, respondent looked over the counter at the victim and saw a .38 caliber pistol on top of a cigar box of rolled change. S/F 2532-33, 2597-98, 2669.[8] Respondent picked up the pistol and handed Robinson the cigar box,[9] and they left the store. S/F 2598. Robinson dropped some of the rolls of change on the way out, and respondent picked them up. S/F 2634, 2647. The total amount taken was either $600 (Lewis, S/F 2533) or $300 to $400 in rolls of quarters and dimes (Respondent, S/F 2599).[10]

Respondent and Robinson returned to Holden's car. According to Officer Lewis, respondent said that he

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[8] The assistant manager of the store confirmed that the supply of change kept in the cigar box was rolled. S/F 2456.

[9] According to Officer Lewis, respondent said he went behind the counter through an opening in the middle to obtain these items. S/F 2532. The victim had fallen into a corner, *ibid.*, and Officer Lewis did not testify that respondent stepped over or around the victim. Respondent denied the prosecutor's suggestion that he had done so. S/F 2627-28.

[10] The State's evidence is in conflict as to whether any bills were taken. Officer Lewis said that respondent also confessed to taking bills from the cash register, S/F 2532; James Mitchell, to whose apartment the robbers went to divide the proceeds, remembered only the rolls of change, S/F 2669. Respondent testified that no one went to the cash register because it was closed and there "was too much happening." S/F 2598. The first police officer to arrive at the scene found the cash register drawer closed. S/F 2471.

told Holden "Man, we had to shoot somebody." S/F 2533. Respondent testified that his words were "Howie had to shoot him." S/F 2629. Holden drove respondent and Robinson to the apartment of James Mitchell, where the proceeds of the robbery were divided. S/F 2599.[11]

2. The Penalty Trial

Immediately following respondent's conviction, a penalty trial was conducted before the same jury pursuant to Texas Code of Criminal Procedure Article 37.071.[12] At the outset of this proceeding the State chose to rest its case "[s]ubject to the right to reopen." A. 11. The trial judge, seeking clarification, asked the pro-

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[11] On rebuttal, the State called James Mitchell, to whom respondent had admitted the robbery, S/F 2670; Andrew Swift, to whom respondent sold the .38 caliber gun taken in the robbery and tried to sell an automatic pistol, S/F 2682; and Martha White (S/F 2691-94) and Yolanda Lewis (S/F 2694-97). The latter two testified that respondent "possessed a pistol in a public place and nothing more." *Smith* v. *State,* 540 S.W.2d 693, 699 (Tex. Crim. App. 1976); A. 44. The Texas Court of Criminal Appeals further criticized the Dallas prosecutors for using this testimony, declaring that "[i]t is this continued persistence in making borderline error that causes certain counties in this State to have a much worse reversible error record than others." *Ibid.*

The record similarly reflects that the prosecutors made numerous inflammatory remarks throughout the trial, to which the trial judge sustained objections. See S/F 2521-22, 2607, 2610-11, 2613, 2615-16, 2637, 2638, 2644-45, 2708, 2760-61, 2861. See also *Smith* v. *State, supra,* 540 S.W.2d at 699-700; A. 46.

[12] In this proceeding, the State has the burden of proving beyond a reasonable doubt that the answer to each of the following questions is "yes":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

secutor whether he would reopen only if the defense chose not to put on any testimony. The prosecutor responded:

> I think since we are permitting them to go first, if they can start putting on their testimony as if that's the normal thing to do, then we will put on our testimony after theirs.

Ibid.

The defense first called Robert Terry Roy, owner of the .32 caliber automatic pistol carried by respondent during the robbery. Mr. Roy confirmed that the gun was defective and could not be fired. S/F 2771-72. He further confirmed that respondent was aware of these facts. S/F 2773.

The defense next called Sarah Smith, respondent's stepmother, and Louise Smith, respondent's aunt. They testified to his general truthfulness and dependability, his good grades in school, and his honorable discharge following service in Vietnam. S/F 2777-81.[13] Sarah Smith also testified that respondent is married and has two sons. S/F 2778.[14]

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(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

A "yes" answer to all three questions results in a mandatory sentence of death.

[13] An objection to a question as to whether Mr. Smith had been awarded a Purple Heart in Vietnam was sustained. S/F 2777.

[14] At the time of the offense respondent was separated, but continued to see his wife and children (ages 3 and 8) daily. S/F 2583, 2606.

The sentencing jury also had before it respondent's testimony at the trial of guilt or innocence. Mr. Smith, age 26 at the time of trial, S/F 2583, had served in the military for three years including a year and a half in Vietnam, S/F 2584. Following his honorable discharge in May of 1969, he first worked as a telephone repairman with Western Electric and then obtained a better position at Texas Instruments. S/F 2585. In 1970 he was arrested for possession of marijuana, pleaded guilty, and was placed on probation. S/F 2585-86. As a result of this conviction—Mr. Smith's only prior criminal record—he was discharged from his job at Texas Instruments and experienced difficulty obtaining steady employment. S/F 2586, 2605.[15]

Respondent also testified that when the victim appeared to reach for a pistol, he said "Look out, Howie" and tried to get out of the way himself. S/F 2596, 2600, 2601, 2621. Mr. Smith knew that the gun in his possession would not fire, S/F 2590-91, 2594, and denied attempting to fire it, S/F 2601, 2620-21, 2632. After Robinson shot the victim, respondent was "frightened" and "scared." S/F 2598. Back at the car he told George

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[15] Respondent alleged, and the State did not deny, that the quantity of marijuana was no more than a partially filled small matchbox. A. 64. In 1970, possession of any quantity of marijuana was a felony in Texas, see former Tex. Penal Code Art. 725(b) §§ 1(14), 2(a), and 23 (repealed by Acts 1973, 63rd Leg., p. 1165, ch. 429, § 602, eff. August 27, 1973), and it was not necessary to allege the quantity in an indictment, see *Fletcher* v. *State,* 282 S.W.2d 230 (Tex. Crim. App. 1955); *Gonzalez* v. *State,* 323 S.W.2d 55 (Tex. Crim. App. 1959). Today, possession of small quantities of marijuana is a misdemeanor in Texas, and possession of any quantity "may not be considered a crime involving moral turpitude." See Tex. Civ. Stat. Art. 4476-15 § 4.05.

Holden to take him home, but Holden insisted on driving to James Mitchell's house to divide the money. S/F 2599. After that Holden still refused to take respondent home, S/F 2643, so respondent spent the night on a couch at a friend's apartment, S/F 2652.[16] Mr Smith stated that he "barely slept" that night, although he had "[n]o problem sleeping" the little that he did. *Ibid.*

At the conclusion of his testimony on direct, respondent was asked:

> Q. Ernest, do you understand and know that it is wrong to do what you did and what you were involved in?
>
> A. Yes, sir.
>
> Q. Do you regret this thing has happened to Mr. Moon [the victim]?
>
> MR. MULDER [prosecutor]: We object to that.
>
> THE COURT: Sustained.

S/F 2602.[17]

After the defense had rested at the penalty phase, S/F 2781, the prosecutor called Dr. James P. Grigson. A. 11. Defense counsel moved that Dr. Grigson not be permitted to testify, noting that he was a surprise witness who had not been named on the State's witness

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[16] Respondent knew this friend's address because he had once been invited to a party there and had the address in his wallet. S/F 2650. He did not say that he attended a party following the robbery.

[17] The district court, in its opinion granting habeas corpus relief, criticized both the prosecutor for interposing this objection and defense counsel for not recalling Mr. Smith at the penalty phase to complete his answer. See *Smith* v. *Estelle*, 445 F.Supp. 647, 658-59 n.18 (N.D.Tex. 1977); A. 141.

list submitted in advance of trial. A. 16. The trial judge, by order of January 4, 1974, had directed the prosecutor to list all of the witnesses to be used in the State's "case in chief" both at the guilt stage, and, "if known," at the punishment stage. A. 4-5. The prosecutor's list, filed on March 11, 1974, had not included Dr. Grigson. A. 7. On March 25, 1974, the opening day of the guilt trial, the court had entered an order prohibiting the prosecutor from calling any person not on the list. A. 9.

At the penalty trial, Dr. Grigson testified on *voir dire* examination outside the presence of the jury that he had visited respondent on February 18, 1974. A. 14. He went to the jail after having been told by the prosecutor that the trial judge wanted him to examine Mr. Smith. A. 15.[18] The doctor had not advised defense counsel of the interview. A. 14.[19] He had, however, discussed his findings with the prosecutor, A. 14, 15, and the prosecutor had asked him in advance to testify in this case, A. 15-16. Then, on the Thursday before the trial began, the prosecutor had advised Dr. Grigson that he would be needed the following week:

> Q. When did he tell you that you would be called to testify?

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[18] The trial judge, in an affidavit submitted to the district court below, confirmed the oral nature of the request. The judge further stated that the defense attorneys had never raised any question of respondent's competence or sanity, and that he had requested the examination solely to satisfy himself personally that Mr. Smith was competent to stand trial. See p. 25-26, *infra*.

[19] Defense counsel had been appointed on October 25, 1973, see note 5 *supra;* respondent had been indicted on December 28, 1973, A. 1, 125, Tr. 4-5.

A. Let's see. I only knew I was testifying today about—let's see—1:45. No, must have been about 2:30. I had seen Mr. Mulder last Thursday, and he said that they had selected a jury and that they were putting on the trial and would probably need me to testify some time this week.

A. 15.

Q. Did he ever indicate that you would be called to testify?

A. Yes. Last Thursday, certainly he said that it looked like, you know, they were getting a jury, and he would probably need me to testify this week.

Ibid.[20]

Defense counsel's motion to bar Dr. Grigson's testimony was overruled without explanation by the trial judge, and the doctor was permitted to testify against respondent. A. 17. Defense counsel accepted the trial judge's offer of a one-hour recess. *Ibid.*

Dr. Grigson testified that he had spoken with Mr. Smith for approximately 90 minutes. A. 27, 30. He had conducted a "mental status examination," A. 20, which included asking respondent what he was doing "on or around or about the time that the alleged offense took place," A. 21. Mr. Smith had co-operated fully with the doctor, and had been pleasant, courteous, and extremely

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[20] The trial of guilt or innocence began on a Monday (March 25, 1974) and concluded the following afternoon (Tuesday, March 26th). Immediately thereafter on that same Tuesday, the penalty trial was conducted. See A. 1, Tr. 5. The previous Thursday referred to by Dr. Grigson (March 21st) was five days prior to the date of the doctor's testimony.

polite. A. 29, 31, 32, 33. The doctor had not spoken with Mr. Smith's relatives or conducted any investigation of respondent other than the 90-minute interview. A. 31-32.

Dr. Grigson felt, based upon respondent's answers during the interview, A. 32, that respondent had shown no remorse for the crime, A. 22, 24, 26. The doctor concluded that respondent was a "very severe sociopath" who would continue to commit criminal acts of violence. A. 24, 25-26. Dr. Grigson further stated that no psychiatric treatment could change respondent's behavior, A. 25, and that respondent could not improve but could only continue the same way or get worse, A. 24-25.

Dr. Grigson was the State's only witness at the penalty phase. Following summations[21] and the court's charge, the jury answered "yes" to all three questions posed by Tex. Code Crim. Pro. Art. 37.071(b). Tr. 121.[22] A judgment accordingly was entered imposing the death penalty. Tr. 123.

3. The Appeal

In his brief on appeal, Mr. Smith's principal trial attorney argued that the defense had been prejudiced at

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[21] In summation, the prosecution relied heavily upon Dr. Grigson's testimony and stressed that "[h]e wasn't hired by the State. He was appointed by the Court. Evidently the Court has confidence in his evaluations . . ." S/F 2855.

[22] See note 12 *supra*. During its deliberations the jury asked the court to "give us examples of criminal acts of violence." Tr. 85. The court declined to do so. Tr. 86.

the penalty phase because of the manner in which Dr. Grigson had been brought into the case:

> The Court appointed a psychiatrist who, unknown to defense counsel (T-2949) [A. 14] and in collusion with the State, examined the defendant, [sent] a report to the Court and to the State, conferred with the State, was never listed as a State's witness in contempt of a Motion to "List", then testified in a crucial part of the trial as to his findings over objection (T-2931) [A. 16], and contrary to a Motion in Limine granted by the Court (T-65) [A. 9].

Brief for Appellant in *Smith* v. *State,* pp. 45-46. The brief contended that this occurrence, taken together with other acts of prosecutorial misconduct during the trial (see note 11 *supra*), had the effect of "denying Appellant a fair trial"—especially "when viewed in the light that this was a case in which the State was seeking a verdict of *DEATH," id.* at 45 (emphasis in original).

On February 18, 1976, the Texas Court of Criminal Appeals affirmed Mr. Smith's conviction and death sentence. *Smith* v. *State, supra,* 540 S.W.2d 693; A. 37. The court ruled upon the merits of the claim concerning Dr. Grigson's testimony: it held that Dr. Grigson had been used as a "rebuttal" witness, and therefore did not come within the purview of the trial judge's order requiring the State to list the witnesses for its "case in chief." 540 S.W.2d at 699; A. 45. The court also commented that Dr. Grigson's interview should have placed Mr. Smith himself on notice that the doctor might testify. *Ibid.*

Judges Odom and Roberts of the Court of Criminal Appeals dissented as to respondent's sentence, in separate opinions. A. 48, 58. Judge Odom's dissent, in which Judge Roberts concurred, focused primarily on the testimony of Dr. Grigson. Noting that the State's brief relied exclusively upon the doctor's testimony to support the death sentence, A. 49,[23] Judge Odom stated that "such future-telling testimony is admissible under no theory of law and prejudicial beyond relief, requiring reversal of this case," A. 51. "The introduction of such highly prejudicial psychiatric speculations deprived appellant of a fair trail at the punishment stage." A. 53.

In his application for rehearing, pp. 6-7, defense counsel again protested the surprise nature of Dr. Grigson's testimony:

> No one, not the Court or anyone else, ever advised Appellant's lawyers about [Dr. Grigson's] visit, before or after. It was logical to assume that this was a routine examination to fulfill a responsibility to determine that the Defendant being put on trial was sane.

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[23] See brief of Appellee State of Texas in the Court of Criminal Appeals, p. 4: "In conclusion, it seems difficult to imagine a situation where there would be any more qualified and explicit evidence to support a jury's finding than the unchallenged expert testimony of Dr. James P. Grigson which is outlined above. Hence, the evidence is clearly sufficient and no error is presented."

> . . . the really *scary* thing here is that in Dallas County the *State* can send a "doctor" into the jail, who by and through his medical cloak can discuss the minute details of a crime with an unwary, unsuspecting Defendant, and then go back and discuss his interview and his "findings" with an Assistant District Attorney. This is what Dr. Grigson did as *shown* by the record. (Emphasis in original.)

The application asserted (p. 6) that the prosecution's use of Dr. Grigson at the penalty trial violated this Court's decision in *Brady* v. *Maryland,* 373 U.S. 83 (1963).

The Court of Criminal Appeals denied rehearing on July 14, 1976. At this time, Judges Odom and Roberts withdrew their dissenting opinions. 540 S.W. 2d at 700; A. 47.[24] On March 7, 1977, this Court denied certiorari, 430 U.S. 922, with Justices Brennan, White and Marshall dissenting.

4. The State Habeas Corpus Proceeding

Following the denial of certiorari, the state trial judge set an execution date of April 26, 1977.

On April 18, 1977, respondent filed a state habeas corpus petition raising claims identical to those subsequently alleged in his federal habeas corpus petition. By order of April 20, 1977, the Texas Court of Criminal Appeals denied habeas corpus relief. The court did not state any reasons for its decision.

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[24] For an analysis of the reasons for this action, see Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics,* 5 Am. J. Crim. L. 151, 166-67 n.24 (1977).

B. Proceedings In The Federal Courts

1. The Petition

Respondent filed his federal habeas corpus petition on April 21, 1977. The petition alleged, *inter alia,* that "the introduction of the testimony of Dr. Grigson at petitioner's trial violated his privilege against self-incrimination and his rights to fair notice and the effective assistance of counsel." Petition, ¶ 12(B), A. 72-73. Mr. Smith alleged that Dr. Grigson had gone to see him prior to trial, without notifying defense counsel or obtaining counsel's permission, and that "[t]he record is silent, and neither petitioner nor his counsel has information, as to why a psychiatric evaluation was ordered prior to his trial." A. 72. The petition further alleged that Dr. Grigson had not been named on the State's witness list, despite the trial court's order requiring the prosecution to provide such a list and despite the prosecution's having told Dr. Grigson prior to trial that he would be called; and that defense counsel did not know until about ten minutes before the doctor took the stand that he would be a witness. A. 72-73. The petition alleged that these circumstances

> prevented petitioner's trial counsel from effectively defending against the charge that there existed a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society.

A. 73.

Mr. Smith also alleged that he had not been told before or during his conversation with Dr. Grigson that

his statements to the doctor could be used against him at trial, or that he had a right to consult with counsel and/or have counsel present, or that he had a right to remain silent, or that he had a right to terminate the interview. A. 73. In sum, he alleged that

> [n]o circumstance pertaining to the interview provided notice to petitioner that it had any adversarial purpose or that his statements could form the basis of, or be used as evidence to support, a determination that he should be put to death.

Ibid. Noting that Dr. Grigson's testimony had included his recollection of Mr. Smith's statements concerning the facts of the crime, the petition alleged that

> [p]etitioner was unwittingly induced to provide, by his own statements, the only evidence offered by the prosecution to suggest that he might be dangerous in the future and should therefore be put to death.

Ibid.[25]

2. The District Court's Orders of April 22 and 29, 1977

On April 22, 1977, the district court (Hon. Robert W. Porter) stayed Mr. Smith's execution. A. 85-87. On April 29, 1977, the court entered an order requiring the State to file an answer and requiring Mr. Smith to file "a report detailing with specificity the factual disputes in this case." The order stated that "[a]fter this factual report is received the court will promptly determine whether an evidentiary hearing is required." A. 88-89.

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[25] The petition also alleged that Mr. Smith's death sentence violated the Eighth and Fourteenth Amendments because he had been denied constitutionally adequate consideration of mitigating circumstances. A. 63, 65-66.

3. The State's Answer

The State's answer did not address Mr. Smith's claim that he had been denied fair notice of the prosecution's intention to call Dr. Grigson, other than to say that "[c]ounsel for Petitioner was supplied with a report by this physician and was aware of the result of the examination." A. 96. None of the factual allegations of the petition pertinent to this claim were specifically denied,[26] and the State did not claim that Mr. Smith's counsel had made an insufficient objection to Dr. Grigson's testimony at trial. See A. 95-96.

In response to the Fifth and Sixth Amendment claims of the petition, the State again did not plead the defense of waiver; the answer addressed the issues on the merits. The State did not specifically deny or dispute any of the petition's factual allegations underlying these claims, but rather argued as a matter of law that Mr. Smith had no right to remain silent during Dr. Grigson's interview or to have counsel present. A. 95-96.

4. Letter to the District Court Delineating Factual Disputes

By letter of August 25, 1977 to Judge Porter, with a copy to the State's attorney, one of Mr. Smith's lawyers delineated the issues which he thought were unlikely to involve factual disputes and were therefore

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[26] The answer contains a general concluding paragraph stating that "Respondent denies each and every allegation of fact made by the Petitioner except those specifically admitted to herein or those supported by the Record." A. 102.

fit for resolution on summary judgment. Among those listed were the Fifth and Sixth Amendment questions raised by paragraph 12(B) of the habeas corpus petition. A. 104-06. The State's attorney did not reply to the letter.

5. The District Court's October 1977 Request for Affidavits

By letter to Mr. Smith's principal trial attorney, dated October 6, 1977, Judge Porter requested that certain facts outside the record be clarified by affidavit. The attorney, John F. Simmons,[27] and his co-counsel at trial, Howard Wilson, were asked the following questions:

(1) What procedures were used to appoint Dr. Grigson to examine Mr. Smith;

(2) Were you or Mr. Wilson notified of this appointment;

(3) Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of his competency to stand trial;

(4) To your knowledge was a written order entered by the court appointing Dr. Grigson;

(5) What was your understanding as to the purpose of Dr. Grigson's appointment;

(6) When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith;

(7) Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the Court summarizing his findings?

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[27] Mr. Simmons continued to serve as one of Mr. Smith's attorneys of record in the federal habeas corpus proceeding.

A. 107. Judge Porter sent a copy of this letter to the State's attorney, and directed her to prepare and file controverting affidavits "if she determines them appropriate." A. 108.

The affidavits submitted by Mr. Simmons and Mr. Wilson stated that the attorneys had no idea what procedures had been used to bring Dr. Grigson into the case, were never notified of any appointment of the doctor by the trial judge, and knew of no order reflecting any such appointment. A. 109-10, 112, 115. They had never raised any question concerning Mr. Smith's competence to stand trial or his sanity. A. 109-10, 113, 115. They had not learned of Dr. Grigson's interview with their client until some time after jury selection had begun; then, looking through the court file, they had noticed a letter in the file from Dr. Grigson to the trial judge.[28] They had attached no significance to the letter, assuming that the judge had merely asked for an informal examination to be certain in his own mind that the defendant was competent to stand trial. A. 110-112-13, 116. They knew of no written report by Dr. Grigson. A. 110, 113, 116.

The State responded by filing an affidavit from the trial judge, R.T. Scales. He confirmed that Mr. Smith's

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[28] The letter, dated February 28, 1974, contains a brief summary of Dr. Grigson's evaluation of respondent based upon an interview at the Dallas County Jail on February 18, 1974. Dr. Grigson concluded that "it is my opinion that Ernest Benjamin Smith, Jr., is aware of the difference between right and wrong and is able to aid an attorney in his defense. If I can be of any further help to you regarding this case, please let me know. He is a severe sociopath." A. 6.

attorneys had not raised any question of competence or sanity, and that he had nonetheless asked Dr. Grigson to visit the defendant in order to satisfy himself personally that Mr. Smith was competent to stand trial. A. 117. Judge Scales further stated that his request to Dr. Grigson was made by oral communication and was not reflected by written order or letter, A. 118, and that "[a]s best I recall," he had notified Mr. Simmons of the appointment, *ibid.* The judge added that he had placed Dr. Grigson's letter in the court file, and that he knew of no written report by the doctor. *Ibid.*

6. The District Court's December 1977 Request for Affidavits

At the district court's request, A. 142, Mr. Simmons submitted an additional affidavit on December 21, 1977. A. 121. In this affidavit, he stated that his general objection to Dr. Grigson's testifying at the penalty trial was based upon "all the matters brought out in the just-completed [*voir dire*] hearing," and primarily upon the State's failure to name the doctor on its witness list. A. 122. He had not interposed a more specific objection because "so far as I knew at the time this had been a routine psychiatric examination by a court-appointed psychiatrist to determine the defendant's competency to stand trial . . . At the time I was surprised that there could be anything Dr. Grigson could testify to on punishment that would be germane to the issues. I certainly had no suggestion that the State intended to use Dr. Grigson's testimony as a basis for sending Ernest

Benjamin Smith to the Electric chair." *Ibid.* The State did not file a responsive affidavit.

7. The District Court's Opinion

On December 30, 1977, Judge Porter issued his opinion, invalidating Mr. Smith's death sentence on four separate constitutional grounds. *Smith* v. *Estelle,* 445 F.Supp. 647 (N.D. Tex. 1977); A. 124-153.

a. Due Process violation

The district court held that Mr. Smith had been denied due process of law by the manner in which the prosecution used Dr. Grigson's testimony at the penalty trial.

Recounting the facts surrounding the doctor's appearance, as reflected by the trial record and the affidavits, Judge Porter found that "[t]he state's evidence at the punishment stage was introduced in such a way as to deny defense counsel effective cross examination of Dr. Grigson." 445 F.Supp. at 655; A. 133. By putting Dr. Grigson on the stand as a surprise witness after the defense had rested, the prosecution also effectively precluded defense counsel from calling psychiatric witnesses for the defense. 445 F.Supp. at 655; A. 134. The court explicitly found that the prosecution had "intentionally omitted Dr. Grigson's name from the witness list in violation of the trial court's order even though the prosecutor knew at least several days before the punishment stage that Dr. Grigson would be called as a witness

and that his testimony would not be rebuttal testimony but would be critical to the state's case." *Id.* at 658; A. 139.

Judge Porter noted that "[e]ffective cross examination and the ability to obtain a psychiatric expert for the defendant are especially critical when psychiatric testimony is introduced because studies have shown that the opinions of psychiatrists in this area [prediction of future dangerousness] are often unreliable and invalid." *Id.* at 655; A. 134. The district court summarized an extensive body of psychiatric and legal writings questioning the ability of psychiatrists to predict future violent acts. *Id.* at 655-57; A. 134-38. It did not conclude that such testimony should be excluded from evidence, but did hold that:

> [W]hen the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant. When that fair opportunity is denied the defendant, as it was here, our adversary system breaks down and a man is unjustly sentenced to die.

Id. at 657; A. 138.

In summary, the district court concluded that due process had been violated because of the concurrence of the following seven factors at respondent's trial:

> (1) Dr. Grigson was informed of his appointment by the prosecutor and not through written order of the court; (2) defense counsel was never notified of the appointment; (3) a psychiatric report was never

> filed; (4) defense counsel never received a copy of Dr. Grigson's letter summarizing his conclusions, sent to the judge; (5) the state's attorney intentionally omitted Dr. Grigson's name from the witness list in violation of the trial court's order even though the prosecutor knew at least several days before the punishment stage that Dr. Grigson would be called as a witness and that his testimony would not be rebuttal testimony but would be critical to the state's case; (6) the psychiatrist was appointed to determine competency but was permitted to testify on the completely unrelated issue of "dangerousness"[29] and; (7) the trial judge permitted the state's attorney to create the impression with the jury that Dr. Grigson had been appointed by the Court for the purpose of determining the defendant's "dangerousness" and that the court was therefore vouching for Dr. Grigson's testimony.

Id. at 658; A. 139 (footnote omitted).

Judge Porter added that if Dr. Grigson had been brought into the case in a manner consistent with due process, and defense counsel had nonetheless failed to seek out defense psychiatric testimony for use at the penalty phase and to "explore the ramifications of the psychiatric issue," the court would be compelled to hold on this record that Mr. Smith had been denied effective assistance of counsel. *Id.* at 658 n.16; A. 139. The district court found, however, that "[u]nder the above described circumstances" defense counsel had protected their client's interest "to the extent possible"; it therefore declined to find ineffective assistance. *Ibid.*

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[29] The district court concluded that if the prosecution intends to call at the penalty phase a psychiatrist appointed by the trial judge for a different purpose (*e.g.*, to conduct a competency exam), notice of its intention must be given to defense counsel. *Id.* at 657 n.15; A. 138-39. [Footnote added.]

b. Eighth Amendment violation

The district court held that the circumstances constituting a due process violation also resulted in a violation of respondent's Eighth Amendment rights. The court noted that under *Jurek* v. *Texas,* 428 U.S. 262 (1976), the constitutionality of the Texas death-sentencing procedure "rests upon the ability of the defendant to present mitigating circumstances." 445 F.Supp. at 658; A. 140. Here, Mr. Smith had been denied that right because he had been effectively deprived of the opportunity to challenge Dr. Grigson's highly assailable testimony and to obtain countervailing psychiatric testimony in his own behalf. Judge Porter held that since the jury had been precluded by the state's misconduct from considering all relevant evidence on the question of penalty, Mr. Smith's death sentence constituted cruel and unusual punishment. *Id.* at 659; A. 141.

c. Fifth Amendment violation

The district court held that a Texas capital defendant may not be compelled to submit to a psychiatric examination to determine his possible future dangerousness; that respondent accordingly had a Fifth Amendment right to remain silent when interviewed by Dr. Grigson; and that the failure to advise him of that right in the present context rendered his death sentence constitutionally invalid. The court based its ruling upon the unique nature of the psychiatric examination conducted here: unlike a competency exam, which is non-

adversarial in nature, this examination was employed for the highly adversarial purpose of attempting to bring about petitioner's execution; and unlike a sanity exam, which results from the defendant's raising a question as to his own sanity, this examination was used because the prosecution sought by psychiatric evidence to satisfy its burden of proving future dangerousness—an issue which it alone had raised. 445 F.Supp. at 663; A. 149-50. In this setting, the court held that

> [i]f . . . the Defendant does not request a psychiatric examination on the issue of "dangerousness" and does not seek to introduce testimony on this issue, he may not be compelled to participate in a psychiatric examination to determine dangerousness.

Id. at 663-64; A. 151.

Referring specifically to the Grigson examination and testimony, Judge Porter rejected the State's contention that Mr. Smith's communications to Dr. Grigson were "non-testimonial" in nature. "Here it is not only the *way* the Defendant communicates to the psychiatrist, but also the content of *what* he says that forms the basis of the expert opinion." *Id.* at 662; A. 148 (emphasis in original). See also the footnote to this passage, setting forth an example of Dr. Grigson's reasoning from the content of respondent's statements to him. *Id.* at 662 n.27; A. 148.

Judge Porter observed that by the prosecution's own concession, Dr. Grigson's testimony was the only evidence it had to meet its burden of proof on the issue

of probable future dangerousness. *Id.* at 663; A. 150; see also note 23, *supra.* Yet "[t]his testimony would have been gutted—if not rendered completely worthless, without the cooperation of Smith." *Ibid.* Accordingly, the district court concluded that if the State wishes to conduct a psychiatric examination on the subject of the defendant's probable future dangerousness, it must warn the defendant of his right to remain silent. Finding upon undisputed facts that "Smith was not so advised in this case," the court held that his death sentence was obtained in violation of his rights under the Fifth Amendment. *Id.* at 664; A. 151.[30]

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[30] Although no issue of waiver had been raised by the State, the district court commented on the possible applicability of the Texas "contemporaneous objection rule" to Mr. Smith's Fifth Amendment claim. (This issue was again not advanced in the certiorari petition, but the State has briefed it before this Court. The State's brief also seeks now to interject a "contemporaneous objection" argument under Texas law as to the other issues in this case, although it did not advance that argument in either the certiorari petition or in any of the proceedings in the courts below.) The district court ruled that the State's failure to plead the Texas "contemporaneous objection rule" in its answer constituted a waiver of that defense, and commended the State for joining issue on the merits to facilitate decision of the Fifth Amendment question. *Id.* at 659-60; A. 142-43. Judge Porter further found that, in any event, Mr. Smith had clearly met the "prejudice" test of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), insofar as *Sykes* might govern consideration of the Fifth Amendment issue where the trial objection to Dr. Grigson's testimony had not been rested specifically upon Fifth Amendment grounds. He did not decide whether respondent had met the "cause" test of *Sykes,* but merely noted that he had requested defense counsel's affidavit of December 21, 1977, to provide a record on that question should the appellate courts hold *Sykes* applicable notwithstanding the State's failure to invoke it. *Ibid.*

d. Sixth Amendment violation

Judge Porter held that Texas capital defendants do not have a Sixth Amendment right to the presence of counsel during a psychiatric interview.[31] He did find a Sixth Amendment violation here, however, arising from the surprise nature of Dr. Grigson's testimony. Since defense counsel had been effectively prevented from refuting the doctor by cross examination and the calling of additional experts, Mr. Smith had been deprived of effective assistance of counsel. 445 F.Supp. at 660-61; A. 143-46.[32]

8. The State's Motion for a New Trial

The State moved for a new trial pursuant to F.R. Civ. P. 59 (a). In this motion the State sought for the first time to invoke the "contemporaneous objection" rule on the Fifth Amendment issue, noting that defense counsel's contemporaneous objection to Dr. Grigson's testimony at the trial had not specified a Fifth Amendment claim. Also for the first time, the State requested an evidentiary hearing.

The district court denied the motion on March 27, 1978. The court stated that a Rule 59 (a) motion should

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[31] As previously noted, he did hold that defense counsel must be advised in advance that such an interview is to take place. *Id.* at 657 n.15; A. 138-39.

[32] The district court expressly declined to rule upon several other constitutional challenges to Mr. Smith's death penalty raised by the habeas corpus petition: ". . . as I have granted the relief requested with respect to the punishment phase it is unnecessary to reach these additional issues." *Id.* at 664; A. 152.

not be granted "to enable the moving party to present a different theory than he adopted at trial." A. 154. And Judge Porter declined to reopen the case for a hearing, noting the State's belated request for a hearing "with some amazement" because the State had earlier been presented "with every opportunity to demand such a hearing" but had failed to do so. A. 155.

9. The Fifth Circuit's Opinion

On September 13, 1979, the court of appeals unanimously affirmed the district court's decision. *Smith* v. *Estelle,* 602 F.2d 694 (5th Cir. 1979); Appendix A to the certiorari petition.

a. Due Process and Eighth Amendment violations

The court of appeals held that the prosecutors' conduct in this case violated Mr. Smith's rights under *Gardner* v. *Florida,* 430 U.S. 349 (1977):

> The defect which the Supreme Court identified in *Gardner*—defense counsel's inability to challenge or answer the evidence on which the death sentence was based . . . —is conspicuous here as well. As a result Smith's sentencing hearing was at least as unreliable as the proceedings in *Gardner*. And the justifications for the unreliable procedures were far weaker here.

602 F.2d at 699; certiorari petition appendix (hereinafter "CA") at 8-9.[33] Observing that "[s]urprise can be as ef-

[33] The court noted that "[t]he principles of *Gardner* seem to be derived from both the eighth amendment and the due process clause

fective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, *Gardner* v. *Florida,* 430 U.S. at 357 . . . , and in foreclosing 'that debate between adversaries [which] is often essential to the truth-seeking function of trials,' *id.* at 360," the court concluded that the prosecutors' use of Dr. Grigson as a surprise witness was basically unfair and "devastating" to Mr. Smith. *Id.* at 699; CA. 9-10.

The court noted the psychiatric and legal authorities questioning the ability of psychiatrists to predict future dangerousness, and also observed Dr. Grigson's extensive record of testifying for the prosecution and repeatedly predicting future dangerousness in capital cases. *Id.* at 699-701 n.7; CA. 10-13. It concluded that "[e]ven a moderately well prepared defense attorney would have had some success in impeaching Dr. Grigson's testimony or offering an opposing view," through readily available material which could have been presented if defense counsel had not been caught unprepared by the State's tactics. *Id.* at 700 n.7; CA. 11.[34]

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of the fourteenth amendment." See 602 F.2d at 698-99 n.4; CA. 8. The court of appeals did not address the district court's additional holding that by unfairly hampering respondent's ability to challenge or answer Dr. Grigson's testimony, the prosecutor's surprise tactic also violated Mr. Smith's Sixth Amendment right to effective assistance of counsel.

[34] The court rejected on several grounds the State's claim that defense counsel's failure to move for a continuance constituted a procedural default: (i) the State had not pleaded the issue in the

In its brief in the court of appeals, the State had claimed for the first time that Dr. Grigson was not a rebuttal witness but rather was "temporarily unavailable to testify" at the outset of the penalty trial. Fifth Circuit Brief for Appellant Estelle, p. 23. The court of appeals noted that this claim (i) was outside the record; (ii) was inconsistent with the factual ground upon which the Texas Court of Criminal Appeals had affirmed Mr. Smith's death sentence; and (iii) did not excuse the State's failure to add the doctor to the court-ordered witness list. 602 F.2d at 703 n.12; CA. 17. *Id.* at 702 n.11; CA. 16. The court of appeals criticized the prosecution's behavior as "irresponsible conduct," *id.* at 703, CA. 17, and held that Judge Porter's finding of a deliberate attempt to surprise defense counsel was not clearly erroneous. *Id.* at 702-03; CA. 16-17.[35]

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district court; (ii) the State did not argue before the Fifth Circuit that under Texas law, "moving for a continuance is the only way to object to surprise"; and (iii) if defense counsel did commit a procedural default, it should either be excused or deemed ineffective assistance of counsel under the circumstances. The court further noted that in *Gardner* there had been no objection at all in the state trial court; here, defense counsel had objected to Dr. Grigson's testimony. *Id.* at 701 n.8; CA. 13-14.

[35] The court of appeals also rejected the State's claim that the trial judge's affidavit, stating that "[a]s best I recall" he informed Mr. Simmons of Dr. Grigson's appointment, created a material dispute of fact necessitating an evidentiary hearing. The court noted that even if Mr. Simmons had been so informed, the judge's only stated purpose in requesting the examination was to assess competency; defense counsel, in the absence of notice by the prosecution, would still have been justified in viewing the interview as irrelevant to the penalty trial. *Id.* at 699 n.5 & n.6; CA. 9.

b. Fifth and Sixth Amendment violations

The court of appeals observed that its due process and Eighth Amendment holding, standing alone, would not preclude the use of Dr. Grigson's testimony at a new trial. It further noted that the testimony was admissible under Texas law because the Texas Court of Criminal Appeals had rejected claims of Fifth and Sixth Amendment violations under the circumstances present here, see, *e.g.*, *Livingston* v. *State,* 542 S.W.2d 655 (Tex. Crim. App. 1976). Since the Fifth and Sixth Amendment questions had been decided below and briefed by the parties on appeal, and since the failure to resolve those questions now could result in additional federal collateral proceedings, the court of appeals proceeded to consider them. 602 F.2d at 703 n.13; CA. 18-19.

The court concluded that Mr. Smith clearly had a Fifth Amendment privilege not to speak to Dr. Grigson.[36] It rejected the State's contention that Mr. Smith's communications to the doctor were "non-testimonial," finding that the State had "used the content, not the non-testimonial aspects" of the examination. *Id.* at 704; CA. 19-20. It adhered to Fifth Circuit case law holding that the privilege is inapplicable where a criminal defendant himself raises the defense of insanity, see *United States* v. *Cohen,* 530 F.2d 43 (5th Cir.

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[36] The court observed that a defendant on trial for his life could hardly be compelled to speak with the State's psychiatrist by means of contempt proceedings or the threat of commenting to the jury on his silence. *Id.* at 707; CA. 26-27.

1976); but it distinguished *Cohen* because here Mr. Smith had not sought to present any psychiatric claims or evidence, but rather the State had affirmatively used a psychiatric examination in the first instance to make its case for his execution. *Id.* at 704-05; CA. 20-22.[37] Depriving the prosecution of the use of compelled psychiatric examinations for this purpose would not disable it from obtaining death sentences: the future-dangerousness question posed by the Texas death-sentencing statute is not peculiarly within the realm of psychiatric expertise; and this Court, in approving the statute, had not contemplated a narrow battle of psychiatric experts but rather a far more comprehensive inquiry. *Id.* at 705-06; CA. 22-25.

The court of appeals found that "[n]o one ever told Smith that Dr. Grigson's examination concerned more than Smith's competence to stand trial. No one ever revealed that their ninety-minute interview would be used to gather the evidence that would send Smith to his death. These facts are undisputed. . . ." *Id.* at 703; CA. 18. It concluded that unless some Fifth Amendment protection was afforded, the State can,

> . . . in an effort to gain the defendant's cooperation, mislead him or indeed lie to him about the significance of the examination; it can take advantage of his ignorance or lack of understanding. It can coerce him in any way that does not make his

[37] The court noted that if a Texas capital defendant seeks to offer psychiatric testimony of his own at the penalty phase, he may well be deemed to have waived the privilege, and to be precluded from offering such testimony if he refuses to be examined by the State's psychiatrist. 602 F.2d at 705 & n.15, 707; CA. 21, 22, 26.

> statements less useful to the interrogating psychiatrist. Psychological pressure, sharp practices, and deceit are likely to be, in effect, the means of compelling examinations. These tactics are inherently discriminatory. A knowledgeable defendant, or one with vigilant attorneys, will either simply refuse to submit to an examination or will bargain with the state to have the examination conducted by a psychiatrist who is more likely to favor the defense. Only defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state.

Id. at 707-08; CA. 27. Accordingly, the court held that

> a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial. If a state wishes to prove a defendant's propensity to commit future crimes of violence by using evidence gathered at a psychiatric examination, the defendant must voluntarily consent to the examination. It follows that Judge Porter was correct when he held that if a defendant indicates that he wishes to remain silent, "he may not be questioned by the psychiatrist for the purpose of determining dangerousness." [445 F.Supp. at 664; A. 151] Judge Porter also held that the defendant must be warned that he had a right to remain silent; since Smith was in custody when he was interviewed, this holding, too, was correct.

Id. at 708; CA. 27-28.[38]

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[38] The court of appeals rejected the State's contention that the failure of defense counsel to interpose a specific Fifth and Sixth Amendment objection forfeited respondent's rights, noting that: (i) the State had not properly raised the issue below; (ii) since Texas law was squarely against the defendant, such an objection would have been futile; and (iii) given the surprise nature of Dr. Grigson's appearance, defense counsel should not be faulted for failing to enumerate every constitutional right involved when he objected to the doctor's testimony. *Id.* at 708 n.19; CA. 28.

Finally, the court of appeals held that a Texas capital defendant has a Sixth Amendment right to the assistance of counsel in deciding whether to submit to such an examination. It agreed with Judge Porter that there is no constitutional right to have counsel present during the examination, but observed that the decision whether or not to speak with the psychiatrist

> . . . is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without "the guiding hand of counsel." *Powell* v. *Alabama,* 287 U.S. 45, 57 . . . (1933).

Id. at 708-09; CA. 29.[39]

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[39] The court noted that respondent had already been indicted, and counsel had already been appointed to represent him, prior to the time of Dr. Grigson's examination. *Id.* at 709; CA. 29-30.

10. The State's Petition for Rehearing En Banc

The State sought rehearing en banc on two grounds: (1) that the district court should have conducted a hearing; and (2) that the failure of respondent's counsel to place his trial objection specifically on Fifth and Sixth Amendment grounds constituted a procedural default. Pet. for Rehearing En Banc, pp. 4-9.

On October 22, 1979, rehearing en banc was denied without dissent. None of the judges of the Fifth Circuit requested a poll.

11. The Certiorari Petition

In its certiorari petition, the State abandoned its claim of procedural default and sought review by this Court on three issues: (1) whether there should have been an evidentiary hearing "as to the disputed surprise issue" (cert. pet., p. 4); (2) whether the court of appeals' holding under *Gardner* was incorrect; and (3) whether the court of appeals' Fifth and Sixth Amendment holding was incorrect. The petition does not contain a word concerning the adequacy of defense counsel's trial objections, and does not claim that a hearing was necessary as to the Fifth and Sixth Amendment issues. Upon that petition, this Court granted certiorari on March 17, 1980. _____ U.S. _____, 48 U.S.L.W. 3602.

SUMMARY OF ARGUMENT

I

This case is before the Court upon affirmed findings of fact that the trial prosecutors deliberately omitted Dr. Grigson from the court-ordered witness list in order to surprise Mr. Smith's defense attorneys. The record clearly reflects that Dr. Grigson discussed his findings with the prosecutors in advance of trial, was asked by the prosecutors in advance of trial to testify, and was told by the prosecutors five days in advance of his testimony that he would be called the following week. Yet at no time did the prosecutors advise defense counsel of their intention to call the doctor. Despite the trial court's order precluding the prosecutors from calling in their case in chief any witness not listed, Dr. Grigson was permitted to testify against respondent at the penalty trial.

The use of Dr. Grigson as a last-minute surprise witness deprived the defense of any fair opportunity to meet his extremely prejudicial testimony. His confident predictions of Mr. Smith's supposed future dangerousness, based on a single 90-minute interview, were highly impeachable. But for the prosecutors' tactics defense counsel could have presented abundant authority, through cross examination and defense expert witnesses, for the proposition that Dr. Grigson's predictions were fundamentally unreliable.

The issue here is not whether Dr. Grigson's predictions, or the skepticism of the majority of his profession

as to the reliability of those predictions, are in fact correct. The issue is simply whether the prosecutors' misconduct prevented the sentencing jury from hearing both sides. Since Mr. Smith's one prior conviction for possession of marijuana and his subsequent unemployment hardly establish a propensity to commit future violent criminal acts, Dr. Grigson's predictions were crucial to the State's case for a death sentence. To inflict the penalty of death on the basis of such testimony—unreliable and untested because of a prosecutor's trick—violates Due Process and the Eighth Amendment.

The State's claim that defense counsel's vigorous contemporaneous objection to Dr. Grigson's testimony was inadequate as a matter of Texas law was not raised in the certiorari petition and should not be considered. It has never been raised by the State at any time until its brief in this Court. Furthermore, on the state appeal the Texas Court of Criminal Appeals reached the merits of Mr. Smith's challenge to the surprise nature of Dr. Grigson's testimony. The decision of the Fifth Circuit that Mr. Smith's Due Process and Eighth Amendment rights may not be denied on grounds of procedural forfeiture clearly cannot be deemed "plain error" within the meaning of Rule 40.1(d)(2).

II

The Fifth and Sixth Amendment rights recognized by the court of appeals are appropriate within the context of the capital sentencing trial conducted in this case.

Under Texas law the State has the burden of proving probable future dangerousness beyond a reasonable doubt in order to secure a death sentence. Yet the State here sought to meet that burden through the defendant's own statements, unwittingly made without the slightest awareness that he would be assisting the State's effort to take his life.

The court of appeals documented that this is not an isolated case, but rather one of a long series of cases in which Texas prosecutors have relied upon the testimony of this very doctor, obtained in this very manner, to secure death sentences. The court of appeals was fully justified in determining that a Texas capital defendant faced with this practice has a right to decide for himself, after being warned of his right to remain silent and after receiving the guiding advice of counsel, whether or not to submit to an examination by a psychiatrist whose testimony might later be used to seek his execution.

The State's grounds for challenging this holding of the court of appeals are unpersuasive. It is repugnant to the Fifth Amendment to hold that a man facing trial for his life may be compelled to provide from his own lips the very evidence which the State will use to execute him. Such compulsion is not rendered less repugnant in the context of the sort of psychiatric interview at issue here. In light of the use to which it was put, Dr. Grigson's interview was hardly a routine competency examination, having only the benign and neutral purpose of insuring that the criminal defendant understands the charges and is capable of assisting in his defense. Nor

was it a routine sanity examination, occasioned by the defendant's own claim of insanity, where the defendant's silence might deprive the State of the only genuine means of meeting such a claim. Here the State had the burden of proving Mr. Smith's alleged future dangerousness beyond a reasonable doubt. The State may not satisfy that burden by compelling the defendant to speak with a psychiatrist who will then recommend whether or not he is fit to live.

The safeguards required by the court of appeals to protect the Fifth Amendment privilege are fully appropriate. The warnings that a capital defendant has the right to remain silent, and that anything said can be used against him in a court of law, are basic and fundamental. Because Mr. Smith had been indicted and counsel assigned to represent him long before the Grigson interview, the court of appeals properly held that he had a Sixth Amendment right to the assistance of counsel in deciding whether or not to speak with the doctor.

The State's claim that Mr. Smith's Fifth Amendment rights should be ignored because his trial lawyer did not couch his objection to Dr. Grigson's testimony in specific Fifth Amendment terms was not raised in the certiorari petition. Accordingly, it is not properly before the Court. Furthermore, the State waived any claim of procedural forfeiture in the district court below. The court of appeals correctly found no merit to the State's claim of procedural default, and that determination is not "plain error" under Rule 40.1(d)(2).

III

The court of appeals properly affirmed the district court's determination to grant habeas corpus relief on the basis of the state trial record and the affidavits submitted by both sides. The trial record alone gave the district court ample basis to conclude that the prosecution had used Dr. Grigson as a surprise witness. The affidavits requested by the district court revealed no material dispute of fact concerning respondent's claim of surprise.

ARGUMENT

I

The Prosecution's Deliberate Use Of Doctor Grigson As A Surprise Witness At The Penalty Trial In This Capital Case Deprived Respondent Of Due Process Of Law And Resulted In The Imposition Of Cruel And Unusual Punishment

A.

The circumstances under which Dr. Grigson emerged as a surprise witness at the very end of the penalty trial have been set forth above, and need not be recounted in detail here. It suffices to say that this case is before the Court upon affirmed findings of fact that the Dallas prosecutors (1) "intentionally omitted Dr. Grigson's name from the witness list" and (2) "were deliberately attempting to surprise the defense attorneys

and to force them to examine Dr. Grigson while they were unprepared." *Smith* v. *Estelle, supra,* 602 F.2d at 702-03; CA. 16, 17. Defense counsel, relying upon the trial judge's order barring the testimony of any witness not listed by the prosecution at its case in chief, A. 9, were caught completely unawares. The consequences for Ernest Benjamin Smith, Jr. were "devastating." 602 F.2d at 699; CA. 10.

The state attempts before this Court to distort the facts, claiming in its Statement of the Case that Dr. Grigson "did not know he would be testifying until that day [*i.e.,* the day of his testimony] at approximately 2:30 p.m." (Br. Pet. at 19). This palpably false statement is repeated in the Summary of Argument: "the psychiatrist did not know he would testify until approximately 2:30 p.m. on the day he was called" (Br. Pet. at 15-16). Not until the Argument does the State finally disclose the truth: that although Dr. Grigson did not know until 2:30 p.m. on the day of his testimony (Tuesday, March 26, 1974) that he would be called *on that particular day,* the prosecutor's request that he testify had been made several days earlier (Br. Pet. at 22). The doctor's actual testimony is as follows:

> Q. When did he tell you that you would be called to testify?
>
> A. Let's see. I only knew I was testifying today about—let's see—1:45. No, must have been about 2:30. I had seen Mr. Mulder last Thursday, and he said that they had selected a jury and that they were putting on the trial and would probably need me to testify some time this week.

A.15.

> Q. Did he ever indicate that you would be called to testify?
>
> **A. Yes. Last Thursday, certainly he said that it looked like, you know, they were getting a jury, and he would probably need me to testify this week.**

Ibid. Here and elsewhere on *voir dire,* the doctor repeatedly admitted that the prosecution had asked him in advance to testify, A. 15-16, and that he had discussed his findings in advance with the prosecution, A. 14, 15. The record could not be clearer.

The State next implies that defense counsel should have known that the doctor would testify, despite the deliberate withholding of his name by the prosecution. Br. Pet. at 22-23. But the record establishes that defense counsel, shortly after learning from the court file that Dr. Grigson had been to see Mr. Smith, secured an order barring the prosecution from calling in its case in chief any individual not named on the prosecution's witness list. A. 9. Once the trial judge had signed that order, counsel had every right to assume that Dr. Grigson could not possibly be a factor in the case unless the defense presented the prosecution with some legitimate occasion to call a psychiatrist in rebuttal—as, of course, it did not. The courts below were therefore entirely correct in finding that Dr. Grigson's testimony surprised defense counsel.[40]

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[40] The State suggests that Mr. Smith's trial attorneys should have known that Dr. Grigson would testify because of their encounter with the doctor in another case tried the previous month. Br. Pet. at 23 n.3. This argument cannot be taken seriously; for, whatever

The only conceivable justification for permitting Dr. Grigson to testify despite the trial court's order would be that the doctor had been called as a *bona fide* rebuttal witness. But that untenable claim was not even advanced at trial; and despite its subsequent acceptance by the Texas Court of Criminal Appeals (540 S.W.2d at 699; A. 45), it has since been abandoned by the State. 602 F.2d at 703 n. 12; CA. 17. In its place, the State now offers nothing but a convoluted and distorted analysis of the record. The State had every opportunity in the district court to present the explanations of the trial prosecutors themselves; yet not once have they come forward and denied that they intentionally withheld notice of Dr. Grigson's testimony in a deliberate effort to surprise defense counsel.

It is now settled that in capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida,* 430 U.S. 349, 358 (1977) (plurality opinion). See also *Green* v. *Georgia,* 442 U.S. 95, 97 (1979); *Presnell* v. *Georgia,* 439 U.S. 14, 16 (1978); *Witherspoon* v. *Illinois,* 391 U.S. 510, 522 n.20 (1968). It is equally well established that the difference between death and all other criminal sanctions "calls for a greater degree of reliability when the death sentence is

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may have been their experience with Dr. Grigson in earlier matters, counsel surely had a right to rely on the trial judge's order barring his testimony in *this* case. But, in any event, the trial record of the case cited by the State reveals that Dr. Grigson testified there in response to the defendant's claim of insanity—a far more routine appearance in a far more traditional context. *State* v. *Hovila,* Cause No. C-74-465 QM, 194th Jud. Dist. Ct., Dallas Co., Tex.

imposed." *Lockett* v. *Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion). See also *Gardner* v. *Florida, supra,* 430 U.S. at 359 (plurality opinion); *id.* at 363-64 (concurring opinion of Mr. Justice White); *Woodson* v. *North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion). As the courts below recognized, no intelligible meaning of these principles could permit a prosecutor in a death case to employ a palpable ruse as a means of avoiding effective cross examination and rebuttal of the highly impeachable psychiatric predictions of a highly impeachable expert witness, which the prosecutor has put forward as the exclusive basis for convincing the jury that the defendant is not fit to live.

But that is precisely what the prosecutors did here. On the basis of one 90-minute interview, Dr. Grigson was called as a surprise witness to testify that Ernest Benjamin Smith has "a sociopathic personality disorder" (A. 23), "would have to be way down to the very severe end—at the very end" of the scale of sociopaths (A. 24), that "he will continue his previous behavior . . . He will do it again in the future" (A. 24), that his behavior, "[i]f anything . . . would only get worse" (A. 24; see also A. 25), that "Mr. Smith does not have any regard for another human being's property or for their life, regardless of who it may be " (A. 25), that "[t]here is no treatment, no medicine. Nothing that's going to change this behavior" (A. 25), and that "certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so" (A. 26). These unqualified, remarkably

confident predictions of future homicidal conduct on the part of Mr. Smith—who did not himself kill anyone in the felony-murder of which he stood convicted, and whose entire past criminal record consisted of a single marijuana offense resulting in probation—were laid before the sentencing jury in a manner calculated to deprive Mr. Smith of the least opportunity to demonstrate their fundamental unreliability.

Only last Term, this Court recognized that, "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis," there is a "serious question" as to whether such a diagnosis can ever establish future dangerousness beyond a reasonable doubt. *Addington* v. *Texas,* 441 U.S. 418, 429 (1979). For "[p]sychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient." *Id.* at 430. Nevertheless, Texas law *does* require a finding of future dangerousness to be made beyond a reasonable doubt in order to support a death sentence, Tex. Code Crim. Pro. Art. 37.071(c); Dr. Grigson *did* offer the most "definite conclusions" about the future dangerousness of Ernest Benjamin Smith, Jr.; and, by a blatant prosecutor's trick, Mr. Smith's sentencing jury was denied even the cautionary insights expressed in this Court's *Addington* opinion.

The consequences of the prosecutor's trick were to defeat both the fairness required by Due Process and the

reliability demanded by the Eighth Amendment "in the determination that death is the appropriate punishment in [this] . . . specific case." *Woodson* v. *North Carolina, supra,* 428 U.S. at 305 (plurality opinion). The opinions below set forth abundant authority for the proposition that Dr. Grigson's prediction of future dangerousness was strongly suspect—authority that could have been mustered in Mr. Smith's behalf, through either cross examination or the testimony of a competent defense expert psychiatrist, had defense counsel known that Dr. Grigson would testify. 602 F.2d at 699-701 n.7, CA. 10-13; 445 F.Supp. at 655-57, A. 134-38. One respected commentator, in an article devoted exclusively to this case, has stated that Dr. Grigson's testimony "stood—generously analyzed—at the fringes of professional acceptability" and placed the doctor "at the brink of quackery." Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics,* 5 Am. J. Crim. L. 151, 172 (1977). The American Psychiatric Association's Task Force on Clinical Aspects of the Violent Individual has concluded that psychiatric predictions of future dangerousness "are fundamentally of very low reliability." *Clinical Aspects of the Violent Individual* 23 (1974). The Task Force concluded that

> [p]sychiatric expertise in the prediction of "dangerousness" is not established and clinicians

> should avoid "conclusory" judgments in this regard.

Id. at 33.[41] The opinions below also set forth substantial documentation of Dr. Grigson's particular proclivity to make findings of sociopathy and to predict future dangerousness from them, and of his ready willingness to draw broad and confident conclusions as an expert witness for the prosecution. 602 F.2d at 700-01 n.7, CA. 12-13; 445 F.Supp. at 653 n.7, A. 129-30. See pp. 64-67 *infra.* This evidence could also have been placed before the sentencing jury but for the prosecution's tactics.

A capital trial is hardly "a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams* v. *Florida,* 399 U.S. 78, 82 (1970). Yet in this case, the prosecution treated the penalty phase in precisely that manner. When a man is on trial for his life, the State may not engage in "cloak and dagger" techniques designed to minimize impeachment of inherently unreliable testimony. *Riggs* v. *United States,* 280 F.2d 750, 754 (5th Cir. 1960). See also *Giglio* v. *United States,* 405 U.S. 150, 153-54 (1972), and authorities cited therein.

The State notes that there is no general constitutional right to discovery in criminal cases. *Weatherford*

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[41] The American Psychiatric Association filed an *amicus curiae* brief in the court of appeals, discussing this point in considerable detail and urging affirmance of the district court's decision. See 602 F.2d at 699-700 n.7; CA. 10-11. The APA appears as *amicus curiae* again before this Court.

v. *Bursey,* 429 U.S. 545 (1977). That is true but it is also irrelevant to the issue now before the Court. The issue here is not whether a criminal defendant has the general right to advance notice of the witnesses against him—or the far narrower right to advance notice of a medical expert witness[42] who has obtained pretrial discovery *from* the defendant by interviewing him without notice to his lawyer. The issue is not even whether a defendant facing the death penalty ought to have such rights.[43] The issue is whether a capital defendant who has been *granted* advance notice of the witnesses against him by the trial judge, and has *relied* upon that notice, may be executed on the basis of highly suspect testimony presented in violation of the notice requirement and thereby insulated against rejoinder or truth-testing criticism. We submit that plainly he may not. "[A]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded,. . . it does speak to the balance of forces between the accused and his accuser." *Wardius* v. *Oregon,* 412 U.S. 470, 474 (1973). Here that balance was distorted to Mr. Smith's irreparable disadvantage by a prosecutor's stratagem.

The State further argues that because Dr. Grigson's testimony was presented not in secret but in open court,

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[42] See opinion of the district court, 445 F.Supp. at 655; A. 133: "It is impossible for even the best lawyers to effectively cross examine a medical expert without any preparation."

[43] *Cf.* 18 U.S.C. § 3432. See generally *Logan* v. *United States,* 144 U.S. 263, 304-08 (1892). Compare, *Quinones* v. *State,* 592 S.W. 2d 933, 947 (Tex. Crim. App. 1980) (Roberts, J., dissenting); *Id.* at 949 (Odom, J., dissenting).

the facts of this case "distinguish it from the holding in *Gardner* v. *Florida, supra,* and more closely align it with the fact situation in *Williams* v. *New York*, 337 U.S. 241 (1949)." Br. Pet. at 19. But Dr. Grigson's testimony was a secret until literally moments before he took the stand. Because of the prosecution's tactics, defense counsel was left with no meaningful opportunity to question the doctor's readily assailable conclusions. As the court of appeals observed:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for [defense] counsel to challenge the accuracy or materiality of" evidence, *Gardner* v. *Florida,* 430 U.S. at 357 . . ., and in foreclosing "that debate between adversaries [which] is often essential to the truth-seeking function of trials," *id.* at 360 . . .

602 F.2d at 699; CA. 9.

More significantly, *Gardner* was decided upon a far broader basis than a hairline distinction between its facts and the facts of *Williams.* The prevailing opinion in *Gardner* observed that during the 30 years since *Williams,* "this Court has acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society," 430 U.S. at 357, and stated:

> In 1949, when the *Williams* case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court . . . In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.

> First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. [citations omitted] . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa* v. *Rhay,* 389 U.S. 128; *Specht* v. *Patterson,* 386 U.S. 605. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence . . .

Id. at 357-58.

The character of the procedure under which Ernest Benjamin Smith, Jr. was condemned to die was grossly defective, even by standards less exacting than those demanded when life is at stake. *Cf. Townsend* v. *Burke,* 334 U.S. 736 (1948). Because of the prosecution's tactics, "[t]he *Smith* case went to the penalty jury without full development of virtually all the important aspects of the psychiatric testimony," leaving Mr. Smith to be sentenced to death upon "incomplete and misleading"

evidence. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics, supra,* 5 Am. J. Crim. L. at 212-13. Both the Due Process Clause and the Eighth Amendment "[command] that no such practice as that disclosed by this record shall send any accused to his death." *Chambers* v. *Florida,* 309 U.S. 227, 241 (1940).

B.

The State next argues at length that Due Process was not violated by the *nature* of the psychiatric testimony. Br. Pet. at 24-30. We are at a loss to fathom the reasons why this argument is made. Although Mr. Smith pleaded in his habeas corpus petition that Dr. Grigson's testimony was too unreliable to form a constitutionally adequate basis for his death sentence, A. 70-71, and requested an evidentiary hearing on that question, A. 104, the district court never decided the issue.[44] The district court did, however, comment in *dictum* that psychiatric testimony of this sort should *not* "be excluded per se" from capital trials. 445 F.Supp. at 657; A. 138. Similarly, the court of appeals did not come near holding such testimony inadmissible; it merely noted the obvious fact that, in approving the Texas death-sentencing scheme, this Court had envisioned a broad sentencing inquiry rather than a narrow battle of psychiatric experts. 602 F.2d at 705-06; CA. 22-25.

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[44] As noted previously (see n.32, *supra*), the district court chose not to reach several issues pleaded by Mr. Smith, and those issues remain open for future adjudication if necessary. 445 F.Supp. at 664; A. 152.

The issue before the Court on this record in not whether Dr. Grigson's confidence concerning the ability of psychiatrists to predict future dangerousness — or the skepticism of the majority of his profession — is correct. The issue is simply whether there was a fair opportunity for the jury to hear both sides. The affirmed findings of fact establish that the prosecution's tactics deprived Mr. Smith of any meaningful chance to present the case against Dr. Grigson's position. As the district court observed:

> [w]hen the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant. When that fair opportunity is denied the defendant, as it was here, our adversary system breaks down and a man is unjustly sentenced to die.

445 F.Supp. at 657; A. 138.

It may be that the State, in arguing that "[the] evidence supports both the verdict and the analysis of the psychiatrist" (Br. Pet. at 28), is in some indirect fashion attempting to imply that Dr. Grigson's testimony constituted harmless error. If so, that effort plainly must fail. Dr. Grigson was the only witness for the State at the penalty phase. On appeal to the Texas Court of Criminal Appeals, the State relied exclusively upon his testimony to support the death sentence. See note 23, *supra;* A. 49; 445 F.Supp. at 663 n. 31, A. 150. Obviously, Mr. Smith's one prior conviction for possession of marijuana and his subsequent unemployment would not establish his propensity to commit future violent criminal acts. See p. 13 & n.15, *supra.* See also

Black, *Due Process for Death: Jurek* v. *Texas and Companion Cases,* 26 Catholic U.L. Rev. 1, 14-16 (1977). And, as demonstrated in our Statement of the Case, the State's description of the crime itself is nearly as misleading as its analysis of the facts surrounding Dr. Grigson's testimony. See pp. 7-11, 13-14, *supra.*

Clearly, Dr. Grigson's opinions were by far the most damaging evidence against respondent on the issue of sentence. Indeed, they were the only prosecution evidence at trial directed specifically to the question posed by Tex. Code Crim. Pro. Art. 37.071 (b)(2). As a matter of Texas law, the erroneous admission of far less damaging and central evidence at the penalty phase of a capital trial has been held prejudicial and reversible. See *Cortez* v. *State,* 571 S.W.2d 308 (Tex. Crim. App. 1978) (introduction of improperly authenticated 1954 and 1960 convictions for auto larceny not harmless, even though the prosecution had established more recent convictions for more serious crimes and had also presented psychiatric testimony as to the defendant's probable future dangerousness). And as a matter of federal constitutional law, it is inconceivable that the admission of Dr. Grigson's testimony could be deemed harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967).

C.

Finally, the State urges that despite defense counsel's vigorous contemporaneous objection to Dr. Grigson's testimony, A. 16-17, counsel's failure to move for a continuance constituted a procedural default under Texas law barring consideration of the Due Process and Eighth Amendment claims. Br. Pet. at 30-32. This issue was not raised in the certiorari petition, and therefore should not be considered by the Court. See Rule 40.1 (d) (2), recodified as Rule 34.1(a) (eff. June 30, 1980). Indeed, the issue has *never* been raised by the State at any time in this case prior to its brief in this Court; even the State's own Statement of the Case reflects that the "contemporaneous objection" argument which it advanced on rehearing in the district court and on appeal to the Fifth Circuit referred solely to the Fifth and Sixth Amendment issue in this case. Br. Pet. at 14-15. (That contemporaneous objection argument was also abandoned in the certiorari petition, although the State now seeks to resurrect it.) See also Fifth Circuit Brief for Appellant Estelle, pp. 25-26; Petition for Rehearing En Banc, pp. 8-9.[45]

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[45] Although the State did not argue before the court of appeals that defense counsel had committed a procedural default under Texas law on this question, the court nonetheless chose to analyze the subject in a footnote to its opinion. 602 F.2d at 701 n.8; CA. 13-14. We submit that the grounds enumerated there are more than adequate to meet any claim of procedural forfeiture.

In its brief in the court of appeals, the State cited "no rule of Texas law saying that moving for a continuance is the only way to object to surprise." 602 F.2d at 701 n.8; CA. 13. In its brief in this Court the State has attempted to muster such authority, relying upon state-law cases decided in 1931, 1919, and 1912 (Br. Pet. at

In any event, the Texas Court of Criminal Appeals did not impose any rule of procedural default in deciding the issue of surprise in this case. It ruled on the merits, holding that Dr. Grigson was a rebuttal witness. 540 S.W.2d at 699; A. 45. This Court has consistently declined to find procedural defaults where the State courts, rather than invoking rules of procedural forfeiture, have addressed issues on the merits. See *Payton* v. *New York*, _____ U.S. _____, 48 U.S.L.W. 4375, 4378 n. 19 (April 15, 1980); *Ulster County Court* v. *Allen*, 442 U.S. 140, 153-54 (1979); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976). Cf. *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975). The rule of those cases controls here.

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31). However, in at least one less antiquated case, the Texas Court of Criminal Appeals has indicated that an objection would be sufficient. *Thompson* v. *State*, 537 S.W.2d 732, 736 (Tex. Crim. App. 1976). See also *Hubbard* v. *State*, 496 S.W.2d 924, 926 (Tex. Crim. App. 1973) (procedural forfeiture for failing to "object *or* request a continuance") (emphasis added). And in four other recent cases, that court has entertained claims of surprise without reflecting that a continuance was requested. *Green* v. *State*, 510 S.W.2d 919, 921 (Tex. Crim. App. 1974); *Lincoln* v. *State*, 508 S.W.2d 635, 637 (Tex. Crim. App. 1974); *Clay* v. *State*, 505 S.W.2d 882, 885 (Tex. Crim. App. 1974); *Hoagland* v. *State*, 494 S.W.2d 186, 188-89 (Tex. Crim. App. 1973).

Certainly, on review of the unanimous decision of the court of appeals, that court's determination to reject any supposed inadequacy in defense counsel's strenuous contemporaneous objection to Dr. Grigson's testimony can hardly be deemed "plain error" requiring reversal. See Rule 40.1(d)(2).

II

The Fifth And Sixth Amendment Rights Recognized By The Court Of Appeals Are Appropriate Within The Context Of The Capital Sentencing Trial Conducted In This Case, Where The State Had The Burden Of Proving Respondent's Alleged Probable Future Dangerousness As The Basis For A Death Sentence Yet Sought To Meet That Burden Through Respondent's Own Statements

The court of appeals reached a narrow set of Fifth and Sixth Amendment issues in this case, in view of the likelihood that they would arise "[i]f Texas retried [Mr.] Smith . . ." 602 F.2d at 703 n.13; CA. 18. We believe that the issues should be decided for this reason, although it is not strictly necessary to reach them because the Eighth and Fourteenth Amendment grounds set forth above suffice to establish Mr. Smith's right to relief from his present death sentence.

On the other hand, this case does not present an appropriate occasion to conduct the kind of wide-ranging canvass of the role of the Fifth and Sixth Amendments in all sorts of psychiatric examinations connected with the criminal process which the State's brief proposes. (See Br. Pet. at 35-37.) Notably, the State cites a Fifth Circuit case, *United States* v. *Cohen,* 530 F.2d 43 (5th Cir. 1976), foremost among the many that

have dealt with the various problems arising from court-ordered psychiatric examinations for the purposes of "proof of sanity at the time of the offense or competency to stand trial" (Br. Pet. at 36). The court of appeals below accepted *Cohen* as the law, but found — correctly, as we note at pp. 74-76 *infra* — that the sort of issue presented there was vastly different from the one peculiar to this case. 602 F.2d at 704-05; CA. 20-22. Focusing on the circumstances revealed by this record and the unique use of psychiatric evidence involved when the prosecution undertakes to prove allegations of probable future dangerousness at a Texas death-penalty trial conducted under Tex. Code Crim. Pro. Art. 37.071(b)(2), the court held specifically that

> at the sentencing phase of a capital trial, Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination [although the defendant had no right to the presence of counsel during the examination itself, see 602 F.2d at 708; CA. 28-29].[46]

Id. at 709; CA. 30.

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[46] See also *Schantz* v. *Eyman*, 418 F.2d 11, 13-14 & n.8 (9th Cir. 1969). The right to the presence of counsel during a psychiatric examination, see *Larsen* v. *Illinois*, _____ U.S. _____, 62 L.Ed. 2d 143 (1979) (opinion of Mr. Justice White, dissenting from the denial of certiorari), is not at issue in this case. [Footnote added.]

These rights were tailored to the particular situation disclosed by the present record and by other realities which the court of appeals could judicially notice. The basic facts are stark and simple. On February 18, 1974—more than two months after indictment, A. 1, 125, Tr. 4-5, and almost four months after the appointment of counsel to represent Ernest Benjamin Smith, Jr., Tr. 5—Mr. Smith was visited in the Dallas County Jail by Dr. James P. Grigson. Mr. Smith spoke with Dr. Grigson for approximately ninety minutes, according to the doctor's recollection. A. 27, 30. In that brief period of time—during which Mr. Smith co-operated fully with Dr. Grigson, A. 29, 31, 32—this defendant with his life at stake unknowingly gave the prosecution the basis for the only testimony offered against him at his subsequent penalty trial. Mr. Smith was not advised that the interview could have any adversarial purpose, or that his comments to Dr. Grigson could and would be used by the prosecution to take his life; and he was not advised that, in view of that awesome consequence of the interview, he had a right not to speak with the doctor, and to consult the attorney assigned to represent him before deciding whether to speak with Dr. Grigson or not.

As it did below, the State now seeks to portray this confrontation as benign. "The psychiatrist was court-appointed to examine the mental status of Smith. He was not acting as an agent of the State to obtain self-incriminating evidence by subterfuge or trickery. His conclusions were available to both parties." (Br. Pet. at 35.) The court of appeals took a more realistic view of

the matter. When it observed, in explanation of its Fifth Amendment holding, that "[o]nly defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state," 602 F.2d at 708; CA. 27, and, in explanation of its Sixth Amendment holding, that the question whether to submit to a psychiatric examination that is "literally a life or death matter . . . is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections," etc., *id.* at 708; CA. 29, the court of appeals was responding to something far more specific than the decorous abstractions about "[a] psychiatric examination" or "a mental examination" (Br. Pet. at 36) in which the State now seeks to cloak this case.

The fact is, as the court of appeals noted, that "even in reported, appellate cases, Dr. Grigson has repeatedly testified for the state." 602 F.2d at 700 n.7; CA. 12. Indeed, by his own admission, Dr. Grigson has testified as a witness for the prosecution at the penalty phase in at least 50 Texas capital cases. See *The American Lawyer,* Nov. 1979, p. 25; *Dallas Times Herald,* Sept. 30, 1979, p. 1. Including this case, he has testified for the State in a dozen death cases decided by the Texas Court of Criminal Appeals to date. See *Barefoot* v. *State,* 596 S.W.2d 875, 887-88 (Tex. Crim. App. 1980); *Simmons* v. *State,* 594 S.W.2d 760, 765 (Tex. Crim. App. 1980); *Brandon* v. *State,* _____ S.W.2d _____, No. 59,348 (Tex. Crim. App. April 25, 1979); *Adams* v. *State,* 577 S.W.2d 717, 731 (Tex. Crim.

App. 1979); *Chambers* v. *State,* 568 S.W.2d 313, 324-26 (Tex. Crim. App. 1978);[47] *Anderson Hughes* v. *State,* 562 S.W.2d 857, 863-64 (Tex. Crim. App. 1978); *Eddie Lee Robinson* v. *State,* 548 S.W.2d 63, 65 (Tex. Crim. App. 1977); *Collins* v. *State,* 548 S.W.2d 368, 377-78 (Tex. Crim. App. 1976); *Gholson* v. *State* and *Ross* v. *State,* 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976);[48] *Moore* v. *State,* 542 S.W.2d 664, 676 (Tex. Crim. App. 1976); *Livingston* v. *State,* 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976). Yet

> [h]e has not appeared in the report of any case as a witness for the defense. On many occasions he has declared that a person he examined was a sociopath or was otherwise likely to commit crimes in the future . . . [Citations omitted.] Frequently he reached this conclusion after he was assigned to examine only for competence or sanity . . . [Citations omitted.] We dealt with Dr. Grigson's testimony in *Bruce* v. *Estelle,* 536 F.2d 1051 (5th Cir. 1976). There a habeas corpus petitioner claimed that he had been incompetent to stand trial. Dr. Grigson testified that the petitioner had been competent and was in fact a sociopath, whose apparent symptoms of incompetence were actually part of an attempt to manipulate others. The federal district court relied on Dr. Grigson's testimony and denied relief. We

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[47] In *Chambers* Dr. Grigson testified that: "[m]y profession doesn't state that I've got to wait until he kills twenty people before I can call him a sociopath." 568 S.W.2d at 326. When asked by defense counsel why another examination of the defendant was unnecessary, the doctor responded: "I don't need to see him again and put my life in jeopardy." *Ibid.* And the doctor described the defendant as a " 'cancerous type person' who should be removed from society." *Ibid.*

[48] Federal habeas corpus relief has been granted in this case pursuant to the Fifth Circuit's decision herein. *Gholson and Ross* v. *Estelle,* _____F.Supp._____, Civil Action No. W-78-CA-68 (W.D. Tex. Oct. 30, 1979).

> reversed, holding that the reliance on Dr. Grigson's testimony was clear error in view of other psychiatrists' views and their bases.

602 F.2d at 701 n.7; CA. 12-13.[49] This was the setting in which the court of appeals found it constitutionally vital that a Texas capital defendant have the right to decide for himself, after receiving the guiding advice of counsel, whether or not to submit to examination by a particular psychiatrist whose testimony might later be used to deprive him of his life. See 602 F.2d at 708-09; CA. 27-30.

We turn to the State's grounds for challenging this modest and eminently sensible conclusion.

A.

The State first asserts that Mr. Smith had "no [Fifth Amendment] privielge [*sic*] to be violated" (Br. Pet. at 35) because Dr. Grigson's testimony was used only to impose sentence following conviction, not to establish guilt. See Br. Pet. at 32-35. This argument would be irrelevant to the facts of the present case even

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[49] More particularly, the court in *Bruce* found reliance upon Dr. Grigson's testimony to be clearly erroneous in that his findings were "discredit[ed]" by "extensive medical and lay evidence" to the contrary; the court rejected the doctor's assertion that he was simply "better qualified" to determine Bruce's condition than the other experts consulted. 536 F.2d at 1061. And the Texas Court of Criminal Appeals recently held in a non-death case that Dr. Grigson's testimony for the prosecution had been "so inflammatory and misleading that it deprived appellant of a fair determination on the issue of competency." *Callaway* v. *State,* 594 S.W.2d 440, 443 (Tex. Crim. App. 1980).

if it were correct;[50] but it is so manifestly incorrect that we believe it should be met head on. Having enacted a statute which provides that a person convicted of capital murder shall be sentenced to death if but only if certain additional facts are proved beyond a reasonable doubt by the prosecution, Texas is now asking this Court to hold that no Fifth Amendment privilege attaches to those facts—*i.e.*, that a man facing trial for his life may be *compelled* to provide from his own lips the evidence that the State will use to prove those facts and thus to kill him. Such a proposition manifestly cannot be squared with a constitutional privilege whose "sole concern is to afford protection against being 'forced to give

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[50] The argument would be relevant only if Dr. Grigson had *examined Mr. Smith after conviction* but before sentence. That is apparently the point in time of which the State speaks when it says that "incrimination is complete once guilt has been adjudicated" (Br. Pet. at 33). But of course Dr. Grigson examined Mr. Smith before trial of *either* the issue of guilt *or* the issue of penalty. At that time, Mr. Smith plainly had a Fifth Amendment privilege to refuse to answer potentially incriminating questions asked of him by any agent of the state *in any setting*—civil, criminal, administrative, investigative or otherwise, see, *e.g.*, *Malloy* v. *Hogan*, 378 U.S. 1, 11 (1964); *Kastigar* v. *United States*, 406 U.S. 441, 444 (1972); *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973); *Maness* v. *Meyers*, 419 U.S. 449, 463-65 (1975); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977)—unless he was protected by an appropriate order barring the use of his answers for incrimination *before* they were compelled. (The latter kind of protection might be given as in the case of pretrial psychiatric examinations to determine competency to be tried or sanity at the time of the crime, where the information obtained by the examining psychiatrist is limited in its uses to the purpose for which the examination was ordered.) Here, no such protective order was in effect; and at the relevant time when potentially incriminating evidence was elicited from Mr. Smith by Dr. Grigson, it simply was not true that "incrimination [was] . . . no longer at issue" (Br. Pet. at 34).

testimony leading to the infliction of "penalties affixed to . . . criminal acts," ' " *Kastigar* v. *United States,* 406 U.S. 441, 453 (1972) [quoting *Ullman* v. *United States,* 350 U.S. 422, 438-39 (1956), which in turn quotes *Boyd* v. *United States,* 116 U.S. 616, 634 (1886)]—a protection which it gives "by assuring that . . . compelled testimony can in no way lead to the infliction of criminal penalties." *Kastigar* v. *United States, supra,* 406 U.S. at 461.

The cardinal principle of the Fifth Amendment "is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law . . ." *Culombe* v. *Connecticut,* 367 U.S. 568, 581 (1961) (opinion of Mr. Justice Frankfurter). The privilege "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' " *Ullmann* v. *United States, supra,* 350 U.S. at 426 (1956). "It reflects many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; . . . our sense of fair play which dictates 'a fair state-individual balance . . . by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev, 1961), 317 . . ." *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52, 55 (1964).

The notion that these values are irrelevant to the punishment trial in a capital case is completely repugnant to this Court's view of both the Fifth Amendment

and the capital sentencing process. The privilege applies where a citizen "has reasonable cause to apprehend danger," *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951), arising out of "future prosecutions," *Reina* v. *United States,* 364 U.S. 507, 514 (1960). "Prosecutions" in this sense have never been limited by this Court to proceedings seeking an adjudication of a person's *guilt* of a criminal offense; for almost a century, it has been held sufficient that the proceeding have as its object the imposition of "penalties affixed to . . . criminal acts." *Boyd* v. *United States,* 116 U.S. 616, 634 (1886).[51] Thus the reach of the Fifth Amendment "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In Re Gault,* 387 U.S. 1, 49 (1967).

Under Texas law, the penalty trial is a separate proceeding at which the State has the burden of proving statutorily specified facts beyond a reasonable doubt in order to secure a sentence of death. Tex. Code Crim. Pro. Art. 37.071. This Court has consistently held that in any proceeding to enhance punishment, "the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty" must be fully protected. *Graham* v. *West Virginia,* 224

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[51] And, of course, Mr. Smith here invokes the privilege to protect himself against the use of statements obtained in a court-ordered psychiatric interview conducted *prior* to his sentencing proceeding. Reina, unlike Mr. Smith, was asking for the remission of a sentence already imposed. See *Reina* v. *United States, supra,* 364 U.S. at 513.

U.S. 616, 626 (1912); *Chandler* v. *Fretag,* 348 U.S. 3 (1954); *Reynolds* v. *Cochran,* 365 U.S. 525 (1961); *Chewing* v. *Cunningham,* 368 U.S. 443 (1962). A defendant is not stripped of his constitutional rights where the State, in order to obtain a more severe sentence, must persuade the jury to arrive at "a new finding of fact . . . that was not an ingredient of the offense charged." *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967).

Nowhere is this principle more firmly established than with respect to a sentencing trial in which the defendant faces execution. "[F]undamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Presnell* v. *Georgia, supra,* 439 U.S. at 16 (1978). See also *Gardner* v. *Florida, supra,* 430 U.S. at 357-58 (1977) (plurality opinion); *Green* v. *Georgia, supra,* 442 U.S. at 97 (1979). Where the State seeks to take the life of one of its citizens, an action which "differs dramatically from any other legitimate state action," *Gardner* v. *Florida, supra,* 430 U.S. at 358, it may not be relieved of its obligation to observe our most basic constitutional values.

In this case, the State had the burden of proving that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Pro. Art. 37.071(b)(2). To hold that the State may meet this burden by compelling evidence from the mouth of the defendant would be anathema to the Fifth Amendment.

Common respect for the dignity of a man facing trial for his very life requires obedience to the Fifth Amendment's fundamental command: ". . . that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe* v. *Connecticut, supra,* 367 U.S. at 582. Especially where the consequences of speaking may be one's own death, a capital defendant is entitled to the same protection accorded by the Fifth Amendment to all individuals: the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964).

B.

The State urges, however, that the Fifth Amendment is inapplicable here because Mr. Smith's communications to Dr. Grigson were non-testimonial in nature, and because the Fifth Amendment is generally inapplicable to psychiatric examinations. Br. Pet. at 36-37. In view of the unique nature of the type of psychiatric examination at issue in this case, these contentions are without merit.

Mr. Smith's conversation with Dr. Grigson at the Dallas County Jail cannot even arguably be analogized to giving a blood sample or a voice exemplar. As the court of appeals found:

> . . . Dr. Grigson's diagnosis of Smith rested principally on his conclusion that Smith showed no

> remorse; obviously Dr. Grigson drew that conclusion from the content of Smith's statements to him. Indeed, Dr. Grigson testified, on cross-examination, that the most important basis of his diagnosis was the account of the crime which Smith gave him during their interview. [A. 27-29]. Dr. Grigson accepted that account as accurate and drew his conclusions accordingly, [A. 28]; he also based his diagnosis on comments Smith made and failed to make while he was recounting the crime, [A. 27-29]. Plainly, then, Dr. Grigson—and therefore the prosecution, when it called him as a witness—used the content, not the non-testimonial aspects of Smith's statements.

602 F.2d at 704; CA. 20. See also opinion of the district court, 445 F.Supp. at 662; A. 148. Thus, the State's argument "stretches the rationale for the 'testimonial limitation' to its maximum," because the doctor has relied upon the content of "the accused's own statements regarding his conscious thoughts at the time of the acts." *McCormick on Evidence* 287 (2d ed. 1972). A communication is testimonial where "reliance is to be placed . . . [on the defendant's] consciousness of the facts and the operation of his mind in expressing it . . ." 8 Wigmore, *Evidence* § 2265 (McNaughton rev. ed. 1961).[52] Where, as here, the psychiatrist relied

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[52] In yet another way, the Fifth Amendment privilege is implicated by Dr. Grigson's reliance upon Mr. Smith's statement purportedly showing no remorse: "A psychiatrist's pretrial diagnosis of an accused as a sociopath or psychopath, based on his lack of remorse for the commission of an offense to which he has pleaded not guilty and of which he has not been convicted, is contrary to the traditional presumption of innocence, an 'axiomatic and elementary' principle of law, the enforcement of which 'lies at the foundation of the administration of our criminal law.' *Coffin* v. *United States,* 156 U.S. 432, 453 (1895)." *Gholson and Ross* v.

specifically on the content of the defendant's own statements, it is absurd to "analogize them to the mere exhibition of one's body." *Lee* v. *County Court of Erie County,* 27 N.Y. 2d 432, 439, 267 N.E.2d 452, 456, 318 N.Y.S.2d 705, 710 (1971).[53]

The State's analogy to competency examinations and sanity examinations is equally misplaced. In light of the use to which it was put, Dr. Grigson's interview was no routine competency examination, having only the benign and neutral purpose of insuring that a criminal defendant understands the charges and is capable of assisting in his defense. Nor was it a routine sanity examination, occasioned by a defendant's plea of insanity—a very different situation, in which the defendant's silence might deprive the State of the only effective means of meeting an issue which the defendant himself has interjected into the case. Indeed, the court of appeals noted several times that if the defendant affirmatively seeks to offer psychiatric testimony at the penalty phase, he may well be deemed to have waived his privilege and be required to submit to an examination by the prosecutor's psychiatrist. 602 F.2d at 705 & n. 15, 707; CA. 21, 22, 26. See also opinion of the district court, 445 F.Supp. at 663; A. 150-51.

Estelle, supra, _____ F.Supp. _____, Civil Action No. W-78-CA-68, slip op. at 6 (W.D. Tex. Oct. 30, 1979).

[53] Accordingly, the rule of such cases as *Holt* v. *United States,* 218 U.S. 245 (1910); *Schmerber* v. *California,* 384 U.S. 757 (1966); *United States* v. *Wade,* 388 U.S. 218 (1967); *Gilbert* v. *California,* 388 U.S. 263 (1967); *United States* v. *Dionisio,* 410 U.S. 1 (1973) and *United States* v. *Mara,* 410 U.S. 19 (1973), is simply not factually applicable here.

In this case the State—not the defendant—raised the issue of Mr. Smith's alleged future dangerousness. Under Texas law, the State had the burden of proving such dangerousness beyond a reasonable doubt in order to obtain a death sentence. Tex. Code Crim. Pro. Art. 37.071(b)(2) and (c). And the State sought to meet that burden exclusively through Mr. Smith's own statements, unwittingly made without the slightest awareness that he would be assisting the prosecution's efforts to take his life. It is in that unique context, and that context alone, that the court of appeals mandated Fifth and Sixth Amendment safeguards.[54]

Accordingly, this case has nothing to do with the application of the Fifth and Sixth Amendments and the dictates of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), to psychiatry in general. Competency examinations can be conducted as normal—provided the results may not subsequently be used by the prosecution to seek the defendant's execution. Sanity examinations can be con-

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[54] Of the 37 jurisdictions with death penalty statutes, only two in addition to Texas require a finding of probable future dangerousness as a statutory precondition to imposition of a death sentence. Ore. Rev. Stat. § 163.116 (2)(b)(Supp. 1980); Rev. Code Wash. Ann. 10.94.020 (10)(Supp. 1980-81). Virginia requires either such a finding or, alternatively, a finding that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.4 (C)(Supp. 1979). And Oklahoma lists probable future dangerousness as one of several aggravating circumstances that may be considered by the jury at the penalty phase. Okla. Stat. Ann. Tit. 21 § 701.12(7)(Supp. 1979-80).

To counsel's knowledge, Texas is the only state in which prosecutors have systematically relied upon psychiatric testimony to prove probable future dangerousness.

ducted as normal, and the view of most circuits (including the Fifth) that raising the defense of insanity waives the privilege will be left undisturbed.[55]

Nor will an affirmance here lend the slightest support to the creation of barriers against the civil commitment of mentally ill persons, for this Court has recently declared that "[i]n a civil commitment state power is not exercised in a punitive sense . . . [A] civil commitment proceeding can in no sense be equated to a criminal prosecution." *Addington* v. *Texas, supra,* 441 U.S. at 428. Given the nature and purposes of civil committment proceedings as defined by *Addington,* those proceedings are light-years away from the penalty phase of a capital case.

C.

The question remains whether the safeguards required by the court of appeals to protect the Fifth Amendment privilege in this unique setting, where a capital defendant's communications during a court-ordered psychiatric examination are sought to be used by the prosecution to meet its burden of proof of the

[55] See, *e.g., United States* v. *Weiser,* 428 F.2d 932, 936 (2d Cir. 1969); *United States* v. *Albright,* 388 F.2d 719, 724 (4th Cir. 1968); *United States* v. *Cohen, supra,* 530 F.2d at 47 (5th Cir. 1976); *United States* v. *Bohle,* 445 F.2d 54, 66-67 (7th Cir. 1971); *Pope* v. *United States,* 372 F.2d 710, 720-21 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds,* 392 U.S. 651 (1968); *Karstetter* v. *Cardwell,* 526 F.2d 1144, 1145 (9th Cir. 1975). A number of state supreme courts have held likewise. See, *e.g., Lee* v. *County Court of Erie County, supra,* 27 N.Y.2d at 441, 267 N.E.2d at 457, 318 N.Y.S.2d at 712 (1971), and cases cited therein; *State* v. *Whitlow,* 45 N.J. 3, 11, 210 A.2d 763, 767 (1965).

facts necessary to condemn him to death, are appropriate constructions of the Fifth Amendment's command. We believe that they are fully appropriate, and fully supported by the decisions of this Court.

Ernest Benjamin Smith, Jr., was never told that he might die as a consequence of speaking to Dr. Grigson, *i.e.*, that his conversation with the doctor could be used at the penalty phase of his trial to seek his execution. And he was never told that, in view of that consequence, he had a right to remain silent. These circumstances completely denied him the benefit of the privilege because, as this Court has succinctly noted in another context, if a person "exposed to possible self-incrimination [is] . . . not advised of his right [he] . . . may be deprived of the opportunity to decide whether or not to assert the privilege." *Maness* v. *Meyers,* 419 U.S. 449, 467 (1975). *Cf. Schneckloth* v. *Bustamonte,* 412 U.S. 218, 237-40 (1973).

It was upon the same ground that *Miranda* v. *Arizona, supra,* required the two basic Fifth Amendment warnings that a person undergoing custodial police interrogation must be given: *first,* that he has a right to remain silent; *second,* that anything he says can be used against him in a court of law. See *e.g., Rhode Island* v. *Innis,* ____U.S.____, 48 U.S.L.W. 4506, 4508 (May 12, 1980).

> For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise.

Miranda v. *Arizona, supra,* 384 U.S. at 468.

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.

Id. at 469.

Notably, these two warnings were not seriously questioned by the *Miranda* dissenters. Mr. Justice Clark did not begrudge the defendant " . . . the traditional warning that he may remain silent and that anything he says may be used against him." *Id.* at 500.[56] Mr. Justice Harlan characterized such warnings as "minor obstructions" to law enforcement. *Id.* at 516. And Mr. Justice White similarly focused his criticism upon the superfluity of additional protection where the defendant already "has been plainly advised that he may remain completely silent," *id.* at 538; see also *Escobedo* v. *Illinois,* 378 U.S. 478, 499 (1964) (dissenting opinion of Mr. Justice White) ("Danny Escobedo knew full well that he did not have to answer").[57]

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[56] Indeed, there was some evidence that Ernesto Miranda himself had at least been told as much. *Id.* at 492 n.66.

[57] The essence of the warnings was, of course, given to the defendants in *United States* v. *Mandujano,* 425 U.S. 564 (1976), and *United States* v. *Washington,* 431 U.S. 181 (1977).

The truly controversial requirements of *Miranda*—the provision and warning of a right to counsel before criminal proceedings have been commenced, the provision and warning of a right to state-appointed counsel for indigents in the police station—are totally irrelevant to the present case. Here, a criminal proceeding had begun: Mr. Smith had been indicted and counsel had been appointed to represent him long before Dr. Grigson conducted the interview. Thus, the right to counsel recognized by the court of appeals has nothing to do with the "limited Fifth Amendment right to counsel" declared in *Miranda,* see 384 U.S. at 537 (dissenting opinion of Mr. Justice White), but is rather a Sixth Amendment right resulting from the "initiation of adversary judicial criminal proceedings" against Mr. Smith. *Moore* v. *Illinois,* 434 U.S. 220, 227 (1977) [applying the rule of *Kirby* v. *Illinois,* 406 U.S. 682, 689 (1972) (plurality opinion)]. See 602 F.2d at 709; CA. 29-30. As this Court held in *Brewer* v. *Williams,* 430 U.S. 387, 398 (1977):

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. . .

The right to counsel "is indispensable to the fair administration of our adversary system of criminal justice" and has uniformly been guaranteed in capital cases "at the pretrial stage," *Brewer* v. *Williams, supra,* 430 U.S. at 398; see *Powell* v. *Alabama,* 287 U.S. 45, 57 (1932); *Hamilton* v. *Alabama,* 368 U.S. 52 (1961);

White v. *Maryland,* 373 U.S. 59 (1963), during any " 'critical period of the proceedings,' " *Massiah* v. *United States,* 377 U.S. 201, 205 (1964) [quoting *Powell* v. *Alabama, supra,* 287 U.S. at 57]; see, *e.g., Coleman* v. *Alabama,* 399 U.S. 1, 7 (1970). In this case, Dr. Grigson's fateful visit to Ernest Benjamin Smith, Jr., at the Dallas County Jail proved to be a literally vital stage of the proceedings; yet Mr. Smith never had the constitutionally guaranteed assistance of counsel in deciding whether to speak with the doctor. See *Spano* v. *New York,* 360 U.S. 315, 327 (1959) (concurring opinion of Mr. Justice Stewart).

As the court of appeals recognized, Mr. Smith then faced a decision that would "have a crucial effect on his trial," 602 F.2d at 709; CA. 30—to "a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, . . . a hopelessly difficult decision," 602 F.2d at 708-09; CA. 29. That point could not be more forcefully demonstrated than it was here, where counsel's advice was necessary not merely in deciding whether to talk to a psychiatrist, but whether to talk to this particular psychiatrist, with his particular "biases and predilections," 602 F.2d at 708; CA. 29. For it is plain that Dr. Grigson was the most dangerous man in Texas for Mr. Smith to talk to at this critical stage, see pp.64-67 *supra,* no matter what Mr. Smith happened to say. Here the "subtle and suggestive questions [and] . . . techniques of a highly trained psychiatrist," *Leyra* v. *Denno,* 347 U.S. 556, 559 (1954), were united with a penchant for making

diagnoses of sociopathy and testifying for the prosecution at the penalty phase of capital cases. Nonetheless, Mr. Smith was deprived of the advice of counsel in his decision to put his life in Dr. Grigson's hands. "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." *Tomkins* v. *Missouri*, 323 U.S. 485, 489 (1945). The court of appeals held nothing more than this; and the Fifth and Sixth Amendments demand nothing less. Just as "a prisoner is not 'to be made the deluded instrument of his own conviction,' 2 Hawkins, Pleas of the Crown (8th ed 1824), 595," *Culombe* v. *Connecticut, supra,* 367 U.S. at 581 (1961), neither may he be made the deluded instrument of his own execution.

D.

The State claims, finally, that Mr. Smith's Fifth Amendment rights should be ignored because his defense attorney at trial did not couch his objection to Dr. Grigson's testimony in specific Fifth Amendment terms. Br.Pet. at 37-38. As this issue is nowhere to be found in the certiorari petition, it should not be considered by the Court. See Rule 40.1(d) (2).

The State's conduct in briefing this question after devoting not a single word to it in the certiorari petition is consistent with its approach to the question in the courts below. In the district court, the State answered

the Fifth Amendment claim on the merits and sought a ruling of law in its favor on the constitutional issue. A. 95-96. Even after the district court requested and received an affidavit from Mr. Smith's trial attorney concerning his failure to frame a specific Fifth Amendment objection, A. 142, the State did not invoke any argument of procedural forfeiture by supplemental pleading, and did not even reply to counsel's affidavit. Clearly, the State hoped and sought to prevail on the merits of the Fifth Amendment issue.

The courts below properly held that under these circumstances, the State waived any objection on grounds of procedural default. 602 F.2d at 708 n.19, CA. 28; 445 F.Supp. at 659-60, A. 142-43. The State had an affirmative duty to plead that defense. See *Rinehart* v. *Brewer,* 421 F.Supp. 508, 511 (S.D. Iowa 1976), *aff'd* 561 F.2d 126, 129 (8th Cir. 1977). By seeking to prevail on the merits rather than pleading forfeiture, the State relinquished any claim to reliance upon the latter doctrine. See *Whiteley* v. *Warden,* 401 U.S. 560, 569 (1971); *LaRoche* v. *Wainwright,* 599 F.2d 722, 724 (5th Cir. 1979). It would be monstrous to hold Mr. Smith to a waiver of his constitutional rights in a death case, as the State now seeks to do on the ground that his attorney's timely and forceful trial-court objection to Dr. Grigson's testimony was cast upon an insufficiently broad ground, while relieving the State itself of the consequences of its own waiver of that contention, which it failed to raise in any shape or form at all prior to judg-

ment in the district court[58] and which it once again failed to raise in its certiorari petition.

In any event, the court of appeals correctly found ample basis for rejecting the State's claim of procedural default. 602 F.2d at 708 n. 19; CA. 28. Since the Texas courts have squarely ruled against the very Fifth Amendment claim advanced by respondent below,[59] a specific objection on those grounds would have been futile. *Rummell* v. *Estelle,* 587 F.2d 651, 653 (5th Cir. 1978) (en banc), *aff'd,* ____ U.S. ____, 63 L.E.2d 382, 386 n. 7 (1980). Furthermore, defense counsel did not seek to "sandbag" the trial judge but rather objected forcefully and made a record by conducting a *voir dire* examination of Dr. Grigson. The State has never claimed that Dr. Grigson did in fact warn Mr. Smith of his rights, or that counsel's failure to interpose a specific Fifth Amendment objection deprived the prosecution of an opportunity to make a record to that effect when

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[58] The State did not make its present forfeiture argument until its motion for a new trial under F.R.Civ.P. 59(a). At that belated stage of the proceeding, however, a party may not revoke its waiver of a legal defense and seek to present the defense for the first time as a new legal theory. Rule 59 motions may not be used to present "a new defensive theory which could have been raised during the original proceedings." *Grumman Aircraft Eng. Corp.* v. *Renegotiation Board,* 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds,* 421 U.S. 168 (1975); see also *Rue* v. *Feuz Construction Co.,* 103 F.Supp. 499, 502 (D.D.C. 1952) (as a matter of public policy and orderly court administration, a party may not "gamble" on one legal theory only to raise another on a rule 59(a) motion); Moore, *Federal Practice* ¶ 59.07. Accordingly, the district court properly denied the State's motion. A. 154.

[59] See *Livingston* v. *State,* 542 S.W.2d 655, 662 (Tex. Crim. App. 1976).

memories were freshest. Compare, *Wainwright* v. *Sykes,* 433 U.S. 72, 88-89 (1977); *Roberts* v. *United States,* ____*U.S.* ____, 63 L.Ed.2d 622, 630 (1980). Indeed, the Fifth Amendment issue is before this Court on undisputed facts. 602 F.2d at 703; CA. 18. Thus, the State suffered no prejudice from the absence of a specific Fifth Amendment objection, and the policy reasons underlying *Sykes* are totally absent.

Under the circumstances present here, the State's claim of procedural default clearly is not "plain error" within the meaning of Rule 40.1(d)(2). Accordingly, the Court should not entertain that claim.

III

The Court Of Appeals Correctly Affirmed The District Court's Decision To Grant Habeas Corpus Relief Based Upon The State Trial Record And Affidavits Submitted By Both Sides, Because The Record And Affidavits Did Not Reveal Any Material Dispute Of Fact Necessitating An Evidentiary Hearing

A.

As we have just noted, the Fifth Amendment issue in this case is before the Court on undisputed facts:

> No one ever told Smith that Dr. Grigson's examination concerned more than Smith's competence to stand trial. No one ever revealed that their ninety-minute interview would be used to gather the

> evidence that would send Smith to his death. These facts are undisputed. . .

602 F.2d at 703; CA. 18. At no time in the proceedings below has the State ever requested a hearing on these facts, or so much as suggested that one would be useful. And in its certiorari petition, the State limited its claim that a hearing should have been held to "the disputed surprise issue." Cert. Pet. at 4.

Having chosen to litigate the Fifth Amendment issue solely on the law in the courts below, the State may not claim for the first time at this late date that a hearing is required. *Whiteley* v. *Warden, supra,* 401 U.S. at 569. And having failed to ask for certiorari on that claim, the State may not raise the issue in this Court. Rule 40.1(d)(2).

B.

A district court is hardly required to conduct a hearing before ruling in every habeas corpus proceeding. The court may order the submission of affidavits by both sides as a means of narrowing the issues, to determine whether a hearing is necessary. 28 U.S.C.§ 2246; Rules Governing Section 2254 Cases in the United States District Courts, Rule 7; Wright, *Procedure for Habeas Corpus,* 77 F.R.D. 227, 244-45 (1978); see also *Harris* v. *Nelson,* 394 U.S. 286, 299 (1969). If the affidavits reveal no material disputes of fact, the court may rule as a matter of law without hearing live testimony. *Blackledge* v. *Allison,* 431 U.S. 63, 80-81 (1977); *Browder* v. *Director, Illinois Department of Corrections,* 434 U.S. 257,

266 n.10 (1978); *Walker* v. *Johnston,* 312 U.S. 275, 284 (1941).

In this case, the habeas corpus petition alleged that Dr. Grigson was left off of the prosecution's court-ordered witness list, that counsel for Mr. Smith did not know until approximately ten minutes before the doctor testified that he was to be a witness for the State, and that these circumstances violated Mr. Smith's constitutional rights. A. 72-73. The State's answer did not address this claim at all, other than to state that defense counsel was supplied with the doctor's report and was aware of the result of the examination. A. 95-96. And the state trial record gave the district court ample ground to conclude that Dr. Grigson had indeed been used as a surprise witness. That record reveals that the prosecutor discussed Dr. Grigson's findings with him in advance of trial, A. 14, 15, asked him to testify, A. 15-16, and, at least five days before the trial, told him approximately when he would be needed, A. 15; yet at no time did the prosecutor amend his court-ordered witness list to advise defense counsel of his intentions.

Nonetheless, in the exercise of caution, the district court sought to further clarify the facts by propounding several questions to be answered by affidavits from Mr. Smith's trial attorneys. These questions dealt with the circumstances surrounding Dr. Grigson's "appointment" by the state trial judge, and appear designed to probe whether any of those circumstances indicate that defense counsel knew or should have known that Dr. Grigson would be called by the prosecu-

tion to testify at the penalty trial on the issue of dangerousness. Counsel for the State was notified of these questions and was directed to prepare controverting affidavits "if she determines them appropriate." A. 108. Counsel for the State chose to file only one responsive affidavit, executed by the state trial judge. A. 117-19. At the district court's request, A. 142, an additional affidavit was filed by one of Mr. Smith's trial attorneys two months later. This time, counsel for the State did not respond at all.

Comparing the affidavits submitted by both sides, the district court found no need for a hearing on the question of Dr. Grigson's appearance as a surprise witness at respondent's trial. And with good reason: the affidavits did not reveal any genuine dispute of material facts necessitating such a hearing.

The affidavits are in total agreement that: (i) Mr. Smith's trial attorneys never raised any question as to his competence to stand trial or his sanity, A. 109-10, 113, 115, 118; (ii) the trial judge nonetheless had Dr. Grigson visit Mr. Smith for the sole purpose of satisfying the judge personally that respondent was competent to stand trial, A. 110, 113, 116, 117; (iii) this "appointment" was made by oral communication, and is not reflected by any court order or letter, A. 110, 112, 115, 118; (iv) Dr. Grigson did not prepare any written report of his findings, A. 110, 113, 116, 118; and (v) Dr. Grigson's letter to the trial judge summarizing his findings was not served upon defense counsel, but was merely placed in the court file by the judge, A. 110, 112-13, 116, 118.

One of Mr. Smith's attorneys repeated in his affidavits the unanswered allegation of the habeas corpus petition that he had no advance notice of the prosecution's intention to call Dr. Grigson at the penalty trial. A. 113, 121. This allegation was not disputed by the state trial judge. The State may argue that the trial judge alone was not in a position to refute it definitively. But that does not excuse the State's failure to produce any other controverting affidavits, as required by the district court. Had Dr. Grigson personally informed defense counsel of his impending appearance, an affidavit from the doctor could have been filed. And had the assistant district attorneys prosecuting Mr. Smith accorded defense counsel any advance notice of their intention to call the doctor, surely their affidavits could have been submitted.

In view of the substantial support in the state trial record for the claim that Dr. Grigson materialized at the eleventh hour as a surprise witness, it was the State's obligation to produce affidavits controverting that claim and establishing genuine issues of material facts. *Cf. Bros, Inc.* v. *W. E. Grace Manufacturing Co.*, 261 F.2d 428, 433 (5th Cir. 1958); *Golden Oil Co., Inc.* v. *Exxon Co., U.S.A.*, 543 F.2d 548, 551 (5th Cir. 1976); *Munoz* v. *International Alliance of Theatre Stage Employees, Etc.*, 563 F.2d 205, 213-214 (5th Cir. 1977); *Gossett* v. *Du-Ra-Kel Corp.*, 569 F.2d 869, 873 (5th Cir. 1978). For the State to rest solely upon the trial judge's affidavit — an affidavit that largely corroborated the submissions filed on behalf of Mr. Smith — was to proceed

at its own peril. Cf. *Whiteley* v. *Warden, supra,* 401 U.S. at 569.

The State now points to only one dispute of fact that it says is raised by the affidavits: whether the trial judge notified defense counsel of Dr. Grigson's appointment. Br. Pet. at 39. Both defense attorneys categorically state that they received no such notice. A. 109, 112, 115. The trial judge concedes that there was no order or letter reflecting the appointment, A. 118, let alone indication of service of any such document upon defense counsel. He further concedes that he merely placed Dr. Grigson's letter summarizing Dr. Grigson's findings in the court file, rather than sending a copy to defense counsel. *Ibid.* And the state trial record reflects that when defense counsel objected to the doctor's appearance, the trial judge did not allude to any prior notification of the appointment as a ground for overruling the objection, A. 16-17. *Cf. Blackledge* v. *Allison, supra,* 431 U.S. at 80 n.19. On this record, the trial judge's equivocal statement more than three-and-one-half years later that "[a]s best I recall" he notified defense counsel of the appointment, A. 118, is hardly sufficient to create a genuine dispute of fact. The state judge did not aver with any assurance that he had notified defense counsel. Both defense lawyers squarely averred that he had not, and everything else before the district court corroborates their assertion.

In any event, a dispute on this question alone would not be material to the disposition of the case. Even if defense counsel had been notified of the ap-

pointment, it is undisputed that the purpose of Dr. Grigson's court-ordered visit was merely to inquire into Mr. Smith's present competence to stand trial — not to assess his probable future dangerousness. A. 117. In the absence of notice that Dr. Grigson's examination would address the issue of future dangerousness, defense counsel would still have been justified in viewing the interview as irrelevant to the penalty trial. 602 F.2d at 699 n.5; CA. 9.

The record upon which the district court ruled did not reveal any genuine disputes as to material facts. Accordingly, the court of appeals was correct in holding that the district court committed no error by deciding the case on that record.

CONCLUSION

The judgment below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

Counsel for the American Psychiatric Association hereby respectfully move pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief amicus curiae. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner has been requested, but no response has been received.

The American Psychiatric Association, which is the nation's largest organization of physicians specializing in

psychiatry, has monitored the administration of capital punishment statutes and the role of psychiatric testimony in that process. The instant case specifically involves the use of psychiatric testimony in Texas on the capital sentencing issue of whether a defendant is likely to commit criminal acts in the future. As such, it raises significant issues concerning the role of psychiatrists in capital cases. Resolution of those issues will have an important impact not only on the administration of capital punishment, but also on the quality and integrity of forensic psychiatry. For these reasons, the Association sought and was granted leave to file a brief amicus curiae in this case in the United States Court of Appeals for the Fifth Circuit. That court's opinion referred to and relied upon the information presented to it in the Association's brief. *See Smith* v. *Estelle*, 602 F.2d 694, 699-700 n.7 (5th Cir. 1979).

The Association is uniquely qualified to advise this Court as to the reliability of psychiatric predictions of long-term future criminal behavior, which is a key issue under the Texas capital sentencing statute. The Association is also qualified to discuss the potential impact of any restrictions as to such testimony on other criminal law issues concerning competency and sanity determinations. These factors are critically relevant to this Court's consideration of this case, and the American Psychiatric Association believes that they will not be adequately briefed either by petitioner or respondent.

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BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

INTEREST OF AMICUS CURIAE

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 26,000 of the nation's approximately 33,000 psychiatrists are members. The Association has participated as amicus curiae in numerous cases involving mental health issues, including *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), *Parham*

v. *J.R.*, 442 U.S. 584 (1979), and *Addington* v. *Texas*, 441 U.S. 418 (1979).

The Association has monitored the administration of capital punishment statutes in this country and the role of psychiatric testimony in that process. The instant case raises important questions about how that role will be implemented. In particular, Texas requires a jury finding that a defendant, if not executed, would "commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code. Crim. Pro. Ann. art. 37.071(b)(2) (Vernon Supp. 1979). In the present case, as has generally been the practice in Texas, testimony on this issue was provided by a psychiatrist, even though, in amicus' view, psychiatrists have no special expertise in this area. Moreover, the basis for the psychiatrist's opinion about the defendant was formed at a pretrial examination purportedly concerned with competency to stand trial, and in circumstances where the defendant was not advised that the psychiatrist might subsequently testify against him at the punishment phase of his trial.

Amicus believes that these practices deviate markedly from the constitutional guidelines established by this Court for the administration of capital punishment. Texas has created a system whereby a psychiatrist, seemingly clothed with professional expertise, acts as little more than an arm of the prosecution, providing damaging testimony secured from an unsuspecting and uncounseled defendant. The decision whether this Court will countenance such practices will have important implications not only for the fair administration of capital punishment statutes, but also for the quality and integrity of the practice of forensic psychiatry. Accordingly, resolution of this case will significantly affect the interests of the Association and its members.

STATEMENT OF THE CASE

Respondent Ernest Smith was indicted for murder for participating in a robbery during which the victim was fatally shot by Smith's accomplice. The State announced its intention to seek the death penalty, and the trial court ordered the prosecutor to secure a psychiatric examination to determine Smith's competence to stand trial. Smith's attorney never raised the question of competence and was not apprised of the court-ordered examination at the time it was performed. The examining psychiatrist, Dr. James Grigson, examined Smith for 90 minutes, concluded that he was competent to stand trial, and so advised the court by written letter. Smith was then tried by a jury and convicted of murder.

In Texas, capital cases require bifurcated proceedings: a guilt phase and a penalty phase. Tex. Code Crim. Pro. Ann. art. 37.071 (Vernon Supp. 1979). At the penalty stage, one of the three critical questions to be resolved by the jury is "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at art. 37.071(b)(2).[1] At the penalty phase of Smith's trial, the prosecution initially introduced no new evidence on this issue, but, rather, rested its case subject to a right

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[1] The other two questions, not at issue in this case, are:

> Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> [and]
>
> [I]f raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex. Code Crim. Pro. Ann. art. 37.071(b)(1), (b)(3) (Vernon Supp. 1979).

to "reopen." Smith's counsel introduced testimony from several lay witnesses about his good character and reputation. The prosecution then sought to call Dr. Grigson, even though neither Smith nor his attorney had been informed at the time of Dr. Grigson's pretrial examination, or at any time prior to his testimony, that the doctor might testify on this issue.[2]

Based solely on the information derived from his 90 minute competency examination of Smith, Dr. Grigson testified that in his view Smith was a "sociopath" because he had failed to display any remorse over the homicide. According to Dr. Grigson, sociopaths repeatedly engage in violent behavior and are not amenable to treatment. On this basis Dr. Grigson concluded that Smith "certainly" would continue to commit acts of violence and, therefore, would constitute a continuing threat to society. The prosecution called no other witnesses at the penalty phase of the trial.

The jury returned a verdict mandating capital punishment. The Texas Court of Criminal Appeals affirmed, 540 S.W.2d 693 (1976), and this Court denied certiorari, 430 U.S. 922 (1977). Smith next unsuccessfully sought habeas corpus in the Texas courts, and then filed a writ of habeas corpus in the United States District Court for the Northern District of Texas. On December 30, 1977, that court (Porter, J.), granted the writ insofar as it vacated Smith's death sentence. 445 F.Supp. 647. The decision rested on the constitutional infirmities surrounding the use of Dr. Grigson's testimony at the penalty phase of Smith's trial, including the failure to advise the defendant and his counsel that information learned at

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[2] Dr. Grigson was not listed on the prosecutor's witness list even though the prosecutor intended to call him during the penalty phase. *Smith* v. *Estelle*, 602 F.2d 694, 702 (5th Cir. 1979).

the time of the competency examination might be used as a basis for testimony against Smith at the death penalty hearing. The court further ruled that the failure to advise the defense that Dr. Grigson would testify at the penalty phase until the doctor actually took the stand violated Smith's right to due process of law, his right to the effective assistance of counsel, and his Eighth Amendment right to introduce complete evidence on the question of mitigating circumstances. The State thereupon filed a motion for a new trial, which was denied.

Texas next appealed to the United States Court of Appeals for the Fifth Circuit. On September 13, 1979, that court affirmed the judgment of the district court. It first held, relying on *Gardner* v. *Florida*, 430 U.S. 349 (1977), that the failure to advise the defense that Dr. Grigson would testify at the penalty phase until the doctor actually took the stand violated Smith's rights under the Fifth and Eighth Amendments. 602 F.2d 694, 698-703. In addition, the court went on to hold that a defendant cannot be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial, that he must be so advised by the examining psychiatrist, and that he has a right to the assistance of counsel in deciding whether to submit to the examination. *Id.* at 703-709.

This Court granted certiorari on March 17, 1980. 48 U.S.L.W. 3602.

SUMMARY OF ARGUMENT

I. Although the use of expert testimony in state criminal prosecutions is traditionally a matter of state law, the need for reliability in the determination that death is the appropriate punishment for a capital offense warrants exclusion of psychiatric predictions of long-term future criminal behavior as a matter of federal consti-

tutional law. *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). The professional literature uniformly establishes that such predictions are fundamentally of very low reliability, and that psychiatric testimony and expertise are irrelevant to such predictions. In view of these findings, psychiatric testimony on the issue of future criminal behavior only distorts the factfinding process. To the extent that there are important facts for a jury to consider on this issue, they can be fully presented by lay witnesses who do not testify with the mantle of professional expertise.

II. If, contrary to the argument above, psychiatric testimony may be used in a capital case on the issue of long-term future criminal behavior, the defendant must be provided a full and fair opportunity to challenge and rebut such testimony. This Court's decision in *Gardner* v. *Florida*, 430 U.S. 349 (1977), establishes that a defendant is entitled to a meaningful opportunity to deny or explain information relied upon in the decision to impose the sentence of death. Only when defense counsel is advised that psychiatric testimony will be offered can he adequately prepare cross-examination and rebuttal. The State has no justification for the failure to provide adequate notice.

III. A defendant in a capital case should be allowed to refuse to participate in a psychiatric examination that may lead to testimony against him on the issue of future criminal behavior and should be advised of the purpose of the examination so that he may intelligently exercise this right. The complex of values underlying the Fifth Amendment privilege warrants its application to the penalty phase of a capital case. *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964); *Presnell* v. *Georgia*, 439 U.S. 14 (1978). A psychiatric examination that looks toward securing testimony concerning long-term future criminal behavior invariably requires the defendant to impart testimonial information. The circumstances surrounding such psychiatric interviews,

moreover, necessitate warnings to protect a defendant against unknowing waiver of the constitutional privilege. Recognition of the privilege in this context will not distort the fair state-individual balance that underlies the privilege.

ARGUMENT

This Court has recognized that "death is a different kind of punishment . . . ." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977). Before it may be imposed, a state must assure scrupulously fair procedures aimed at protecting the "interest in reliability" obviously so important in a capital case. *Id.* at 359. Amicus believes that such reliability is undermined by the use of psychiatric testimony on the issue of likely long-term future criminal behavior. Although this Court previously ruled that the question of future criminal behavior is a legitimate inquiry in a capital case, *see Jurek* v. *Texas*, 428 U.S. 262, 275-76 (1976), it did not then focus on the use of psychiatric testimony in relation to this inquiry.[3] The fundamental

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[3] The Court did note in passing that in the one capital case that had then been considered by the Texas Court of Criminal Appeals, which happened to be defendant Smith's appeal, a psychiatrist had testified. 428 U.S. at 273. This factor was noted at the end of a long list of considerations relating to the issue of future criminal behavior. Since the decision in *Jurek*, however, it has become plain that Texas relies almost exclusively on psychiatric testimony to establish its proof on the issue of future criminal behavior. *See, e.g., Gholson* v. *State*, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Livingston* v. *State*, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Moore* v. *State*, 542 S.W.2d 664, 675-76 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Collins* v. *State*, 548 S.W.2d 368, 377 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 959 (1977); *Battie* v. *State*, 551 S.W.2d 401, 406-07 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1041 (1978); *Granviel* v. *State*, 552 S.W.2d 107, 114-16 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Shippy*

disadvantage of utilizing such testimony is that it gives the appearance of being based on expert medical judgment, when in fact no such expertise exists. While traditionally such matters might be appropriate for elucidation on cross-examination, amicus believes that, in the unique circumstances of a capital case, this Court should prohibit the use of such testimony altogether, and thereby bar false claims to expertise that inevitably distort the jury's factfinding process.

Alternatively, even if this Court is unwilling to prohibit the use of psychiatric testimony on this issue, it should establish procedures that assure basic fairness in the utilization of such testimony. At a minimum, constitutionally satisfactory procedures would require that a defendant and his counsel be fully informed when the state plans to rely on such evidence so that the defendant may develop the requisite information to conduct a fair cross-examination and may be prepared to call rebuttal witnesses if he so chooses. In addition, a defendant should be advised prior to a psychiatric examination that it may subsequently be used to form the basis of expert testimony on the issue of future criminal behavior and that he need not participate in such an examination if he so chooses.[4]

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v. *State*, 556 S.W.2d 246, 254-55 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977); *Chambers* v. *State*, 568 S.W.2d 313, 324-25 (Tex. Crim. App. 1978); *Von Byrd* v. *State*, 569 S.W.2d 883, 895-96 (Tex. Crim. App. 1978). Indeed, in most of these cases it has been Dr. Grigson, the physician who testified in this case, who appeared as the State's star witness.

[4] The Court of Appeals held that the defendant has a right to be assisted by counsel in making this decision. 602 F.2d at 708-709. Amicus will not address this issue other than to note our agreement that the assistance of counsel should be available at this critical stage of a criminal proceeding, *see Brewer* v. *Williams*, 430 U.S. 387, 398 (1977), and that such assistance would prove extremely helpful to defendants confronting this important but difficult decision.

I. THE USE OF PSYCHIATRIC TESTIMONY IN A CAPITAL CASE ON THE ISSUE OF WHETHER A DEFENDANT IS LIKELY TO COMMIT SERIOUS CRIMES IN THE FUTURE IS CONSTITUTIONALLY INVALID BECAUSE IT UNDERMINES THE RELIABILITY OF THE FACTFINDING PROCESS.

It is well recognized that the use of expert testimony in state prosecutions is traditionally a matter of state evidentiary law. *See* J. Wigmore, Treatise On Anglo-American System Of Evidence In Trials At Common Law § 6e (3d ed. 1940). Nevertheless, this Court has made clear that capital punishment cases are constitutionally "different," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion), and that it is of "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). In amicus' view the use of expert testimony on the issue of long-term future criminal behavior is inconsistent with these established principles.[5]

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[5] It should be made clear at the outset that amicus is urging a limited prohibition aimed only at *long-term* predictions of violence by psychiatrists. In Texas, the inquiry focuses on the defendant's lifetime, not on a discrete time period where psychiatric expertise might be more relevant. In civil commitment cases, for example, as this Court recognized last Term in *Addington* v. *Texas*, 441 U.S. 418 (1979), psychiatrists often can and do make reliable predictions about short-term prognoses, and such predictions often include potential violence. *See* Monaghan, *Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Re-*

As the court below recognized, "Dr. Grigson's testimony was extremely damaging to the defendant." 602 F.2d at 697. After detailing "his extensive [professional] qualifications," *id.*, Dr. Grigson proceeded to testify as a medical expert, using psychiatric nomenclature to describe Smith, and concluding that "certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so." *Id.* at 698. Faced with this seemingly expert medical testimony, it is not surprising that the jury found that Smith was likely to commit serious criminal acts in the future even though he had no prior record of violent behavior. As this Court has observed, "since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg* v. *Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

Increasingly, psychiatrists have been asked, both in civil and criminal proceedings, to make a variety of long and short term assessments of a person's propensity to commit violent acts in the future. As a result, amicus has for many years been concerned with the question of psychiatric predictions of future violent behavior. In the early 1970's the American Psychiatric Association ap-

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consideration, 135 Amer. J. Psychiatry 198 (1978). In such situations the psychiatrist is able to evaluate the patient's current mental condition and to discern likely behavioral patterns, including potential violent behavior in the near future, if the illness remains untreated.

Similarly, amicus is not contending that psychiatrists should be prohibited from testifying on *all* issues at the penalty phase of a capital case. On the contrary, there are many issues, such as the defendant's mental state at the time of the crime or whether he acted under duress, that are well within the expertise of psychiatrists.

pointed a Task Force comprised of distinguished psychiatric experts with experience in the field of criminal behavior "to assemble the body of knowledge concerning the individual violent patient and the clinical issues surrounding his case." American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, *Clinical Aspects of the Violent Individual* at v (1974) (hereinafter "Task Force Report"). That Task Force submitted a report, "aimed at the practicing clinician," to "describe the current state of the art and [to] provide[] an overview of selected literature and clinical opinion on matters of evaluation, management, and prediction of violent behavior." *Id.* The Task Force focused its analysis on the violent patient—that is, the individual "who acts or has acted in such a way as to produce physical harm or destruction." *Id.* at 1.

The primary conclusion of this Task Force was that judgments as to the long-run potential for future violence and the "dangerousness" of a given individual are "fundamentally of very low reliability," primarily because such judgments are predictions of rare or infrequent events. *Id.* at 23. In some circumstances, of course, a clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children. But, as the Task Force noted, the relatively high degree of reliability in these cases is a function of knowing that the base rate of such behavior—that is, the rate of repetitive past violent acts —is very high for the person under scrutiny.[6] *Id.* "It

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[6] In this case, Smith had no history of committing harmful acts; his only prior conviction was for possession of marijuana. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 Am. J. Crim.

would not be necessary that the patient be 'mentally ill' or suffering from a psychiatric disorder in order to predict that such behavior will recur." *Id.* Thus, to the extent that a psychiatrist's prediction of "dangerousness" is based solely on this knowledge of base rates of behavior, his prediction involves no more "expertise"—and certainly no more "psychiatric expertise"—than does that of the average nonexpert.[7]

According to the Task Force, "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved." *Id.* at 30. " '[D]angerousness' is neither a psychiatric nor a medical

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Law 151, 154 (1977). In view of this fact, it is apparent that Dr. Grigson's testimony that Smith would commit future harmful acts had no scientific basis whatsoever.

[7] One commentator has noted:

> "In an experimental study . . ., college students and psychiatrists agreed extensively on the degree of 'dangerousness' and 'nondangerousness' as indicated by various personality characteristics. This suggests the possibility that psychiatric judgment is not based upon any special knowledge or expertise beyond that of educated laymen. There are also several studies indicating that the diagnostic classifications made by psychologists are not more reliable or valid than those made by laymen."

R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications For Treatment," *in* W.J. Curran, A.L. McGarry & C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 786 (1980) (footnotes omitted). *See* A. Stone, Mental Health and Law: A System In Transition 33 (1975) ("There are . . . a group of patients in which anyone could predict dangerous acts; *e.g.*, drug addicts who regularly support their habit by mugging, but that prediction does not require a mental health professional.").

diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid 'conclusory' judgments in this regard." *Id.* at 33.[8]

The professional literature on the issue of predictions of future criminal behavior was also reviewed and analyzed in a monograph published by the Center for Studies of Crime and Delinquency of the National Institute of Mental Health. A. Stone, Mental Health And Law: A System In Transition 27-36 (1975). That study similarly demonstrated that there are no reliable criteria for psychiatric predictions of long-term future criminal behavior. *Id.* at 29, *citing* S. Halleck, Psychiatry And The Dilemmas Of Crime 348 (1971); Stürup, "Will This Man Be Dangerous?," *in* De Reueck & Porter, The Mentally Abnormal Offender 17 (1968); Kozol, *et al.*, *The Diagnosis And Treatment of Dangerousness*, 18 Crime and Delinquency 371, 383 (1972). These conclusions are equally true today. Indeed, it has recently been noted that "the professional literature almost uniformly affirms low predictive accuracy with regard to the dangerousness of mental patients." R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications for Treatment,"

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[8] A second important observation of the Task Force was that "psychiatrists, in order to be safe, too often predict dangerousness, especially in the case of the mentally ill offenders." Task Force Report at 25. *See* "Prediction of Dangerousness and Its Implications for Treatment," *supra* note 7, at 788 ("Mental health personnel rather consistently overpredict dangerousness.") This tendency toward false positive errors in prediction—that is, persons clinically predicted to be dangerous who are in fact not dangerous—has been attributed, at least in part, to "the strong negative reaction of the public to errors associated with the release of dangerous persons, whereas there is relatively little concern about unnecessary confinement." *Id.*

in W.J. Curran, A.L. McGarry, and C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 784 (1980).[9]

In view of these findings, the use of psychiatric testimony on the issue of long-term future criminal behavior can only distort the factfinding process in a capital punishment trial. To the extent that there are important facts for a jury to consider on this issue—such as a defendant's history of violence—those facts, as in most criminal cases, can be fully presented by lay witnesses who do not testify with the mantle of professional expertise. Indeed this Court recognized as much in *Jurek*, where it upheld the use of the Texas criteria at issue here:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory ques-

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[9] *See also* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, *Psychiatry and The Presumption of Expertise: Flipping Coins In The Courtroom*, 62 Calif. L. Rev. 693 (1974); Livermore, Malmquist & Meehl, *On The Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 17 (1968); Steadman & Cocozza, *Psychiatry, Dangerousness, and The Repetitively Violent Offender*, 69 J. Crim. Law & Criminology, 226, 229-231 (1978); Wenk, Robinson & Smith, *Can Violence Be Predicted?* 18 Crime and Delinquency 393 (1972). *See also United States ex rel. Mathew* v. *Nelson*, 461 F.Supp. 707, 710 (N.D. Ill. 1978).

> tion in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Jurek* v. *Texas*, 428 U.S. 262, 275-276 (1976).

A prohibition against using expert testimony, then, will deny the jury no "possible relevant information about the individual defendant whose fate it must determine . . . ." *Id.* at 276. On the contrary, by sifting the mystique from the facts and leaving only the latter, it will help assure that a sentence of death is not the product of "wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976). The integrity of the criminal process demanded in a capital case will allow for no less.

II. ASSUMING ARGUENDO THAT PSYCHIATRIC TESTIMONY MAY BE USED IN A CAPITAL CASE ON THE ISSUE OF FUTURE CRIMINAL BEHAVIOR, THE DEFENDANT MUST BE PROVIDED A FULL AND FAIR OPPORTUNITY TO CHALLENGE AND REBUT SUCH TESTIMONY.

In *Gardner* v. *Florida*, 430 U.S. 349 (1977), this Court held that the Constitution is violated when a defendant is sentenced to death on the basis of information that he had no opportunity to explain or deny. 430 U.S. at 362-364. In that case, the sentencing judge relied on portions of a presentence investigation report that he considered confidential and did not disclose to either counsel for the State or counsel for the defendant.

In striking down that practice, the plurality opinion reviewed each of the justifications asserted by the State for a capital sentencing procedure that would permit a trial judge to impose the death sentence based on undisclosed information. As to the State's asserted need to provide assurances of confidentiality to potential sources of information, the plurality found intolerable the "risk

that some of the information accepted in confidence may be erroneous, or may be misinterpreted." 430 U.S. at 359. The plurality also found insufficient the State's asserted need to eliminate the potential for delay and to avoid disruption of the rehabilitation process. Finally, the plurality characterized as "foreclosed" by *Furman* v. *Georgia*, 408 U.S. 238 (1972), the contention that trial judges could be trusted to exercise their discretion in a responsible manner. In sum, the plurality concluded that the defendant had been deprived of due process of law because he was denied "the opportunity to deny or explain" information that was relied upon in the decision to impose the sentence of death.[10]

The "opportunity to deny or explain" referred to by the plurality in *Gardner* surely refers to the "opportunity to be heard 'at a meaningful time and in a meaningful

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[10] Mr. Justice White concurred in the judgment on the ground that the use of secret information in a capital sentencing procedure failed to meet the requirement under *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976), for "reliability in the determination that death is the appropriate punishment . . . ." 430 U.S. at 364. In view of that conclusion, Mr. Justice White found it unnecessary to address "the possible application to sentencing proceedings—in death or other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered . . . ." *Id.* Mr. Justice Brennan, though adhering to the views he had expressed in *Gregg* v. *Georgia*, 428 U.S. 153, 227 (1976), stated that he agreed that the Due Process Clause of the Fourteenth Amendment is violated when a defendant facing the death sentence is not informed of the contents of a presentence report made to the sentencing judge. 430 U.S. at 364. Decisions of this Court subsequent to *Gardner* establish that the Due Process Clause is applicable to capital sentencing procedures. *Green* v. *Georgia*, 424 U.S. 95 (1979) (per curiam); *Presnell* v. *Georgia*, 439 U.S. 14 (1978) (per curiam).

manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The circumstances surrounding the presentation of Dr. Grigson's testimony in this case highlight the need for defense counsel to have a *meaningful* opportunity to comment on psychiatric testimony concerning future criminal behavior. As discussed above, the scientific literature seriously undermines the validity of the kind of professional judgments advanced by Dr. Grigson, *See* pp. 13-16, *supra*. Obviously, familiarity with this body of information will not be commonplace among lawyers charged with representing defendants in capital cases. Only when counsel is properly advised that such testimony will be offered can he adequately prepare cross-examination and rebuttal.

In this case, defense counsel was totally denied this important opportunity. First, counsel was not notified in advance that the state trial court had ordered a psychiatric examination of the defendant to determine competency to stand trial. Dr. Grigson filed no formal report after his interview with the defendant, but instead wrote a letter to the state trial judge stating his conclusion that the defendant was competent. A copy of this letter was never sent to defense counsel. By happenstance, defense counsel did see the letter while inspecting the court's files, but they testified that this did not lead them to conclude that Dr. Grigson would testify as to "dangerousness" since his letter went to the issue of competency to stand trial.

Next, the trial court entered an order requiring counsel for the prosecution to list all the State's witnesses whom he in good faith expected to use at the trial of the State's case in chief, both during the guilt or innocence stage and, if known, the punishment stage. This order notwithstanding, the prosecution never notified defense counsel that Dr. Grigson would (or even might) be

called on the issue of dangerousness. Moreover, the trial court subsequently entered an order precluding the prosecution from calling in its case-in-chief any witnesses not named on the witness list. Thus, defense counsel could legitimately claim surprise when the prosecution "reopened" its case after presentation of defense witnesses at the punishment stage to introduce the testimony of Dr. Grigson.

As the court below stated, "[s]urprise can be as eftive as secrecy in preventing effective cross-examination . . . ." 602 F.2d at 699. That is plainly so here. If defense counsel had been provided adequate time to prepare, he could obviously have raised serious questions about Dr. Grigson's testimony. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, And Professional Ethics*, 5 Am. J. Crim. Law 151 (1977).[11]

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[11] In fact, these questions could have covered other issues in addition to the inaccuracy of psychiatric prediction of long-term future criminal behavior. Dr. Grigson testified that Smith was a "sociopath," and he based this conclusion to a considerable extent on his observation that Smith evidenced no "remorse." But the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders was revised in 1968 to eliminate the term "sociopathy" and to reclassify a roughly equivalent category of disorder entitled "antisocial personality disorder." *See* DSM II, ¶ 301.7 (1968). More significantly, the discussion of the "antisocial personality disorder" in the most recent version of that manual evidences the need for an examination of a broad range of the patient's behavior in connection with a diagnosis of that disorder. DSM III, ¶ 301.70 (1980). *See generally*, S. Dinitz, "The Antisocial Personality," *in* W.J. Curran, A.L. McGarry, & C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Science 799 (1980); R.A. Woodruff, D.W. Goodwin, & S.B. Guze, Psychiatric Diagnosis 143 (1974); G.E. Vaillant, *Sociopathy As A Human Process*, 32 Arch. Gen. Psychiatry 178 (1975). This broad behavioral approach undermines

any suggestion that the disorder is established solely or even primarily by the absence of indications of "remorse" as Dr. Grigson suggested.

Moreover, although Dr. Grigson's brief 90 minute mental status examination of Smith may well have been sufficient for a psychiatric determination as to competency, it was wholly inadequate in terms of the detail that should have been pursued to diagnose an antisocial personality disorder or to make a prediction concerning long-term future behavior. A mental status examination focuses on the individual's current perceptions and orientation. By itself, it provides no medical basis for making long-term future behavioral predictions of any type, let alone those aimed at future criminal behavior. *See* Sands, "Psychiatric History And Mental Status," in A. Freedman & H. Kaplan, eds., Comprehensive Textbook of Psychiatry 499 (1977).

Dr. Grigson also testified that no psychiatric treament could change Smith's behavior and that Smith would not improve but would only continue the same way or get worse. But an extensive review of the professional literature in 1972 prompted two commentators to note that, although the results had to be interpreted with some caution, the data indicate that "some techniques may be effective in the treatment of antisocial personality in juvenile offenders and possibly in some adults." Levine & Bornstein, *Is The Sociopath Treatable? The Contribution of Psychiatry To A Legal Dilemma*, 1972 Wash. Univ. L.Q. 693, 711. *See* F.L. Carney, "Inpatient Treatment Programs," *in* W.H. Reid, The Psychopath: A Comprehensive Study Of Antisocial Disorders And Behaviors 261 (1978); Rappeport, *Enforced Treatment—Is It Treatment?*, II Bull. Am. Acad. Psychiatry & Law 48 (1974). Moreover, there is evidence indicating that even if treatment is not possible, the mere passage of time may effect improvement. R.A. Woodruff, D.W. Goodwin, & S.B. Guze, Psychiatric Diagnosis 149 (1974); Cocozza & Steadman, *Some Refinements In The Measurement and Prediction of Dangerous Behavior*, 131 Am. J. Psychiatry 1012 (1974); M. Craft, *The Natural History of Psychopathic Disorder*, 115 Brit. J. Psychiatry 39, 43 (1969). Indeed, the most recent edition of the Association's Diagnostic And Statistical Manual notes that "[a]fter age 30 the more flag-

Counsel could have prepared an effective cross-examination and, indeed, could perhaps have secured convincing rebuttal witnesses. In this manner, the jury could at least have received a more complete presentation of the relevant considerations.

In capital cases, as this Court has made clear, a jury requires both "standards to guide its use of the information [presented]," *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976), and the participation of counsel in "comment[ing] on facts which may influence the sentencing decision," *Gardner* v. *Florida*, 430 U.S. 349, 360 (1977). Here, by contrast, the procedures used by the State deprived the jury of an opportunity to hear defense counsel challenge the accuracy or materiality of the information.[12]

Texas asserts no justification—and amicus can conceive of none—for the failure to give defense counsel adequate notice that expert psychiatric testimony would be admitted on the issue of dangerousness. Instead, Texas argues that since Dr. Grigson's testimony was disclosed on the record, this case is governed not by *Gard-*

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rant aspects may diminish, particularly sexual promiscuity, fighting, criminality, and vagrancy." DSM III, ¶ 301.70 (1980).

[12] It is worth noting in this regard that the statute upheld in *Gregg* v. *Georgia* provided that at the penalty stage of the criminal proceeding "only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible." 428 U.S. at 164, *quoting* Ga. Code Ann. § 27-2503 (Supp. 1975). Moreover, this Court noted in *Gregg* that "the importance of obtaining accurate sentencing information" was underscored by the requirement in Rule 32(c) of the Federal Rules of Criminal Procedure that counsel be afforded an opportunity to comment on the presentence report and to introduce information relating to any alleged factual inaccuracy in the report. 428 U.S. at 189 n.37.

ner v. *Florida*, *supra*, but by *Williams* v. *New York*, 337 U.S. 241 (1949).[13] The argument is flawed. In its zeal to distinguish *Gardner*, Texas apparently overlooks the fact that the plurality opinion in *Gardner* specifically noted that *Williams* was decided some 30 years ago, and that in the interim this Court had "acknowledged its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." 430 U.S. at 357. In the course of that re-examination, five members of the Court had by 1977 concluded that death is a different kind of punishment from any other that may be imposed in this country. And it is now beyond question that "this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J.). The state's continued reliance upon *Williams* v. *New York*, *supra*, is therefore plainly misplaced.

Federal constitutional guarantees surrounding imposition of the unique and irrevocable punishment of death necessitate procedures that meet the need for reliability in the determination that death is the appropriate sentence. That need for reliability is not satisfied when defense counsel is given only a technical opportunity to comment on critical psychiatric testimony and no advance notice sufficient to allow meaningful preparation for cross-examination and rebuttal. The thrust of this Court's ruling in *Gardner* is that the interest in reli-

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[13] The state also argues that the defendant waived any error of constitutional dimension. The Court of Appeals correctly concluded that there was no effective waiver of the constitutional error. 602 F.2d at 701 n.8, 708 n.19; *see Gardner* v. *Florida*, *supra*, 430 U.S. at 361-62 (no waiver where defense counsel failed to request access to entire presentence report).

ability demands "an opportunity to comment on facts which may influence the sentencing decision in capital cases." 430 U.S. at 360. A meaningless "opportunity" to comment fails to further the interest in reliability, and thus fails to withstand constitutional scrutiny.

III. A DEFENDANT IN A CAPITAL CASE SHOULD BE ALLOWED TO REFUSE TO PARTICIPATE IN A PSYCHIATRIC EXAMINATION THAT MAY LEAD TO TESTIMONY AGAINST HIM ON THE ISSUE OF FUTURE CRIMINAL BEHAVIOR AND SHOULD BE ADVISED OF THE PURPOSE OF THE EXAMINATION SO THAT HE MAY INTELLIGENTLY EXERCISE THIS RIGHT.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. 5. "By its very nature, [this] privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch* v. *United States*, 409 U.S. 322, 327 (1973); *see United States* v. *Nobles*, 422 U.S. 225, 233 (1975). That privilege is violated when, as here, a defendant is required without warning to participate in a psychiatric examination that probes this "private inner sanctum of individual feeling and thought," and the results of that examination are then admitted against him in a capital sentencing proceeding.[14]

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[14] The state suggests that the Fifth Amendment privilege is inapplicable to the sentencing phase of the trial because "incrimination is complete once guilt has been adjudicated." Brief for Petitioner, at 33 & n.20, *quoting* Webster's New International Dictionary of the English Language and Black's Law Dictionary. The state is simply wrong. The Fifth Amendment speaks not in terms of "incrimination" but in terms of compulsion to be a witness against oneself in a criminal proceeding. The capital sentencing procedure is a

The complex of values behind the Fifth Amendment privilege warrants application of these principles in the capital sentencing context. *See Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55-57 & n.5 (1964). This Court has observed that "[a]ll these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966) (citations omitted). These policies are critically implicated when the state seeks to punish the defendant with death. Indeed, "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." *Lockett* v. *Ohio*, 438 U.S. 556, 605 (1978) (Burger, C.J.).

Amicus submits that the policies underlying the Fifth Amendment privilege—heightened as they are in the capital sentencing context—dictate that a defendant be allowed to refuse to participate in a court-ordered psychi-

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critical part of a criminal proceeding. Nor is it necessary in this case to address the issue of the application of the privilege to all sentencing, since this case involves only capital sentencing. And as this Court recently noted, certain "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Presnell* v. *Georgia*, 439 U.S. 14, 16 (1978) (per curiam).

atric examination that may result in evidence that can be used against him at the sentencing stage of the proceeding. As the court below properly concluded, a psychiatric examination that looks to long-term dangerousness invariably requires the defendant to impart "testimonial" information. Since the key fact in such an inquiry will be the defendant's history of violence, *see* p. 13, *supra*, it is the substance of his communication that is critical. Hence, this case is different from those involving blood tests, *see Schmerber* v. *California*, 384 U.S. 757 (1966), handwriting samples, *see Gilbert* v. *California*, 388 U.S. 263 (1967), or voice exemplars, *see United States* v. *Dionisio*, 410 U.S. 1 (1973), where noncommunicative evidence is compelled. Indeed, absent a defendant's willingness to cooperate as to the verbal *content* of his communications, it is clear that a psychiatric examination in these circumstances would be meaningless. *See generally* Stevenson, "The Psychiatric Interview," *in* American Handbook of Psychiatry 1138-56 (2d ed. 1974); Will, *The Reluctant Patient, the Unwanted Psychotherapist—and Coercion*, 5 Contemp. Psychoanalysis 23 (1969).

It is also significant to realize that the use of psychiatric testimony at the punishment phase of a capital case arises in circumstances that are vastly different from those involved in competency or sanity adjudications, where compelled examinations traditionally have been upheld. *See, e.g., United States* v. *Cohen*, 530 F.2d 43, 47-48 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); *United States* v. *Albright*, 388 F.2d 719, 724-25 (5th Cir. 1968). In the latter instances, it is typically the defendant who presses the issue either to avoid trial or as an affirmative defense.[15] If the prosecution cannot

[15] Even in jurisdictions where the trial court may raise such matters *sua sponte*, the purpose is to protect the incompetent defendant and to maintain the integrity of the criminal process, not to seek an enhanced penalty or alter-

then secure its own psychiatric examination, the defendant is given an undue advantage. *See United States* v. *Cohen, supra; United States* v. *Albright, supra.* In short, the defendant in these circumstances effectively "waives" his right to object to a compelled examination. *See United States* v. *Malcolm*, 475 F.2d 420, 425 (9th Cir. 1973); *United States* v. *Weiser*, 428 F.2d 932, 936 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

When it comes to psychiatric testimony at the penalty phase, by contrast, it is the state that seeks imposition of the death penalty; it, therefore, must go forward to show that the defendant is likely to commit harmful acts in the future. Thus, unlike a plea of incompetence or a defense of insanity, there is no comparable waiver in a capital case unless, as the district court ruled in this case, "the Defendant initiates a psychiatric examination on the issue of dangerousness or if he seeks to introduce psychiatric testimony at the punishment phase . . . ." 445 F.Supp. at 663. In the absence of such a waiver theory, the rationale of cases such as *United States* v. *Cohen, supra*, would be plainly inapposite, and a defendant should not be compelled to participate in a psychiatric examination on issues concerning the penalty phase.[16]

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native means of conviction. *See Whalem* v. *United States*, 346 F.2d 812 (D.C. Cir.), *cert. denied*, 382 U.S. 862 (1965). In any event, this Court need not here decide whether a psychiatric examination can be compelled on sanity or competence when the defendant does not raise those issues.

[16] Nor can a psychiatric examination focused on issues that are dispositive of capital punishment be analogized to a compelled psychiatric examination in a civil commitment case where the purpose of hospitalization, at least in part, is to help the severely ill patient. *See Addington* v. *Texas*, 411 U.S. 418 (1979). In short, as *Addington* recognized, whole-

It should be emphasized that recognition of a right to refuse participation in psychiatric examinations that could lead to testimony for capital sentencing purposes would not distort the "fair state-individual balance" that underlies the Fifth Amendment privilege.[17] *See Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964). To begin with, in determining the likelihood that a defendant would be a continuing threat to society, a sentencing jury is free to—and indeed should—consider a wide range of information, including the range and severity of the defendant's prior criminal conduct, his age at the time of the offense, and whether he acted under duress or other situational pressures. The availability of these other sources of information relevant to the issue of "dangerousness" negates any suggestion that the failure to allow a compelled psychiatric examination will unduly hamper the fair administration of justice. Moreover, in view of the overwhelming evidence indicating that psychiatric predictions of dangerousness are not based on medical expertise, *see* pp. 13-16, *supra*, recognition of the privilege in this context serves to exclude information that is at best of questionable validity and usefulness.

In addition, in circumstances such as those presented here, the defendant should not be required to guess that he may refuse to participate in the psychiatric examination. Rather, a warning as to the right to remain silent

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sale adoption of the adversary process employed in criminal cases is not warranted in the civil commitment context. Rather, a more particularistic due process analysis is required.

[17] Nor would such a right interfere with court-ordered competency or sanity examinations. Rather, when a defendant refuses to participate in an examination that could lead to testimony on the issue of future criminal behavior, the examining psychiatrist can be required to limit his testimony to the issues of competency and sanity.

and as to the fact that anything said can be used against the individual is "the threshold requirement for an intelligent decision as to [the] exercise [of the privilege]," *Rhode Island* v. *Innis*, 48 U.S.L.W. 4506, 4508 (May 12, 1980), *see Maness* v. *Meyers*, 419 U.S. 449, 467 (1975), especially because the defendant may be under the impression that the examination relates only to issues of competency or sanity. Indeed, warnings may well be required to avoid actual deception in this regard. Thus, this case cannot be viewed as a so-called "ordinary case," *Garner* v. *United States*, 424 U.S. 648, 654 (1976), "where the government has no substantial reason to believe that the disclosures are likely to be incriminating," *Roberts* v. *United States*, 48 U.S.L.W. 4370, 4372 (April 15, 1980). On the contrary, the circumstances at issue here involve the in-custody interrogation of a criminal defendant by a *de facto* agent of the State who "has repeatedly testified for the state." *Smith* v. *Estelle*, 602 F.2d at 700 n.7.[18] As the Fifth Circuit noted, Dr. Grigson "has not appeared in the report of any case as a witness for the defense[,] . . . [o]n many occasions . . . has

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[18] Dr. Grigson has testified for the State in at least eleven other death cases decided by the Texas Court of Criminal Appeals. *See Barefoot* v. *State*, 596 S.W.2d 875, 887-88 (Tex. Crim.App. 1980); *Simmons* v. *State*, 594 S.W.2d 760, 765 (Tex.Crim.App. 1980); *Brandon* v. *State*, —— S.W.2d ——, No. 59,348 (Tex.Crim.App. April 25, 1979); *Adams* v. *State*, 577 S.W.2d 717, 731 (Tex.Crim.App. 1979); *Chambers* v. *State*, 568 S.W.2d 313, 324-26 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 928 (1979); *Hughes* v. *State*, 562 S.W.2d 857, 863-64 (Tex.Crim.App. 1978); *Robinson* v. *State*, 548 S.W.2d 63, 65 (Tex.Crim.App. 1977); *Collins* v. *State*, 548 S.W.2d 368, 377-78 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 959 (1977); *Gholson* v. *State* and *Ross* v. *State*, 542 S.W.2d 395, 400-01 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Moore* v. *State*, 542 S.W.2d 664, 676 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Livingston* v. *State*, 542 S.W.2d 655, 661-62 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977).

declared that a person he examined was a sociopath or was otherwise likely to commit crimes in the future[,] . . . [and] [f]requently . . . reached this conclusion after he was assigned to examine only for competence or sanity." [19] *Id.* at 701 n.7. Surely, then, the facts concerning practices in Texas highlight the need for certain limited warnings to safeguard a capital defendant's Fifth and Fourteenth Amendment privilege against compulsory incrimination.[20]

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[19] *See, e.g., Bruce* v. *Estelle*, 536 F.2d 1051, 1054-56 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053 1977; *Livingston* v. *State*, 542 S.W.2d 655, 661 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Gholson* v. *State*, 542 S.W.2d 395, 400-01 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Hurd* v. *State*, 513 S.W.2d 936, 944 (Tex.Crim.App. 1974); *Armstrong* v. *State*, 502 S.W.2d 731, 735 (Tex.Crim. App. 1974).

[20] The ethical principles of the psychiatric profession fully support this position. Section 9 of the American Psychiatric Association's Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry provides:

> "Psychiatrists are often asked to examine individuals for security purposes, to determine suitability for various jobs, and to determine legal competence. The psychiatrist must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination." 130 Am. J. Psychiatry 1058 *et seq.* (1973).

Obviously this principle requires that in a capital case, where the stakes are far greater, the defendant must be informed of "the nature and purpose and lack of confidentiality of the examination." *See also* R. Sadoff, Forensic Psychiatry: A Practical Guide for Lawyers and Psychiatrists 25 (1975) (if the psychiatrist is called in by the government (or prosecution) or by the court as a neutral examiner, he should identify his position and role to the defendant). *See generally* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics, supra* note 6, at 170-212.

In sum, the Fifth Amendment should fully protect a defendant from participating in a psychiatric examination that could lead to testimony at a penalty phase of a capital case without his knowledge and consent. "[W]e do not make even the most hardened criminal sign his own death warrant, or dig his grave, or pull the lever that springs the trap on which he stands." Griswold, The Fifth Amendment Today 7 (1955). Yet, this is precisely what the State of Texas did to Ernest Benjamin Smith.

CONCLUSION

Amicus curiae, the American Psychiatric Association, respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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